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MEDICAL

JURISPRUDENCE

OF

INSANITY

OR FORENSIC PSYCHIATRY.

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WITH AN EXHAUSTIVE PRESENTATION OF THE JUDICIAL DECISIONS UPON THE SUBJECT.

BY F. H. BOWLBY,

COUNSELOR AT LAW, OF THE PUBLISHERS' EDITORIAL STAFF.

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PREFACE.

Modern progress in the study and literature of mental diseases renders unnecessary an apology for a new forensic psychiatry, as the only systematic medical jurisprudence of insanity, in the English language, written by an alienist, was published sixty years ago.

In legal contests it frequently becomes necessary to traverse every aspect of a subject in controversy; an attempt is therefore made to unite, in this work, a general medical text-book upon insanity with a medico-legal treatise, and a digest of the English and American law, to meet the requirements of lawyers and physicians in civil and criminal cases.

To the medical and medico-legal chapters of the author there have been added by the publishers' editorial staff the legal annotation on pages 7, 8 and 9, and the chapters on adjudications prefaced with tables of the parts and sections into which such chapters on decisions of the courts are divided.

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MEDICAL

JURISPRUDENCE OF INSANITY.

CHAPTER I.

INTRODUCTION.

A Medical Jurisprudence of Insanity for practical purposes should set forth clearly and fully our present knowledge concerning mental disease, with special regard to its legal relations; and precisely as the exactness of modern research in this field is demonstrated to intelligent jurists, so will there be improvement of the common and statutory laws relative to insanity.

Psychiatry has become a science in the last few decades, and, as compared with former periods, our available information upon matters pertaining to insanity is now, not only extensive, but of such exactitude that divergences of opinion among "experts" upon essential points in diagnosis and the characteristics of insanity are apt to be due to discreditable causes.

Though scientific and medical books may not be used in evidence, appeals can be legitimately made to recognized standard works in testing the knowledge and consistency of an expert witness. He must admit or deny the correctness of certain authors whose writings are referred to in this work, which, in some instances, are quoted at length.

Much has been said about the conservatism of the law, particularly with regard to decisions concerning insanity; but though much past inconvenience may have been entailed by this proverbial slowness, it has insured stability whenever an advance has been made, and protection against disastrous vacillation.

In the year 1838, Dr. Isaac Ray's Jurisprudence of Insanity was published, and the larger part of his book, if rearranged

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upon the lines of our present knowledge of insanity, or read by one schooled therein, is not only valuable to-day, to physicians and jurists alike, but is simply inimitable, both as regards the material accumulated and the manner in which it is presented. Ray was intellectually superior to his period and surroundings, notwithstanding the evidences of his having been influenced in some respects by the want of knowledge of his time. His most unfortunate advocacy of "moral mania," which proved in many instances to be but a symptom of various kinds of mental derangement, has, more than anything else, curtailed the usefulness of his Jurisprudence; and in this we have an instance of the obtuseness of the times failing to appreciate much of what a brilliant mind had evolved, leaving to a later period the sifting of cases, which he cited mainly from Prichard and Gall, until we now know that, while "moral mania" is an unjustified designation, inasmuch as the immorality was consequent upon (what can now be demonstrated as) insanity of various forms, there is such a disorder, fortunately not very common, as moral imbecility, and there are degenerates with homicidal impulses, who, by the way, seldom carry out their inclinations of that nature; and these were confusedly mingled with paretic dements, paranoiacs, maniacs, epileptics, and even terminal dements, until the moral defects of these insane persons stood forth almost unrelieved by narration of other symptoms of insanity. When a more accurate study and classification had been made, what was called "general moral mania" was in many cases shown to be "monomania," but these two designations were fought on the ground of their describing what it was difficult, and at times impossible, to prove, through assuming that the names should be taken literally, until the term "paranoia" put at end to the misconceptions. Faulty etymology has caused a large share of the war that has been waged upon science and medicine.

The "Preliminary Views" of Ray in his Jurisprudence contain much interesting historical information as to the disastrous results of too rigid adherence to traditional interpretation of the law where insanity was involved; and the influence of Lord Hale in fostering almost savage conceptions of what constituted insanity is discussed at length. But since that time such changes have been effected in English and American judicial views of responsi-

bility, tests of insanity, etc., that these later opinions claim most attention, though here and there the ancient *dicta* obtrude.

So vast is the domain of general medical jurisprudence, and so rapidly has specialism in the different branches of medicine developed, that no single author can do justice to all the subjects included. Better results are secured through a toxicologist confining himself to the medical aspects of poisons with the collaboration of one versed in the law. An alienist should similarly treat of insanity only. Much of the insufficiency and confusion of voluminous works on medical jurisprudence have been directly due to the authors not being specially versed in the subjects they handled. A good chemist cannot do justice to psychiatry, nor should an alienist attempt instruction outside of his particular province. Differentiation and division of labor achieve the best work in all directions.

The diseased states caused by alcoholism, and the modern doctrine that the addiction itself is often a disease, or a form of insanity, suggest the revision of older methods of dealing with inebriates and holding them to a too rigid accountability.

Head injuries are prolific sources of mental degradation, and until recently they were but imperfectly studied.

Degeneration as a special department of psychiatry has received a great amount of attention by French alienists, and the results of their researches are of immense value to both physicians and lawyers.

The abandonment of some misnomers, such as "monomania" and "general paralysis of the insane," has disposed of annoying misapprehensions and useless wrangling, in and out of court-rooms.

Insanity in general, its causes, nature, pathology, and treatment, are incomparably better understood than when the older works on medical jurisprudence were written; and, inevitably, whenever the law has proved laggard in keeping step with alienistic science there can be greater expectation of future legal adjustment to late discoveries and elucidations through a spread of information as to what constitutes such knowledge.

The discrepancy between the laws in criminal and civil cases, and antiquated errors concerning tests of insanity and responsibility, still tincture our legal text-books, almost to the extent Ray deplored in the earlier part of the nineteenth century; but inci-

dentally these matters will be remarked in their appropriate places in this book.

The use of technical terms is minimized throughout, though it is impossible to dispense with them altogether; and it should be more widely known that certain expressions commonly used loosely and synonymously have, in psychiatry, precise meanings, the understanding of which would aid materially in the intelligent use of any treatise upon insanity. For example, "imbecility" and "dementia" are not identical; nor are "hallucinations," "illusions," and "delusions" interchangeable, as will be seen by reference to descriptions of such phenomena. Proper use of the index will assist greatly in the comprehension of what may appear to be obscure to those unaccustomed to the literature of insanity.

CHAPTER II.

DEFINITIONS.

The universal relativity of things makes exact definition an impossibility, and the difficulty of describing either simple or complex phenomena in the limits of a treatise is apparent enough to prevent educated persons from expecting completeness in any dictionary paragraph.

The accepted mathematical definition of a point is absurd, and Herbert Spencer[1] remarks:

"To those who accept the general doctrine of evolution it needs scarcely be pointed out that classifications are subjective conceptions which have no absolute demarcations in nature corresponding to them. They are appliances by which we limit and arrange the matters under investigation, and so facilitate our thinking. Consequently, when we attempt to define anything complex, or make a generalization of facts other than the most simple, we can scarcely ever avoid including more than we intended, or leaving out something that should be taken in. Thus it happens that on seeking a definition of 'life,' we have great difficulty in finding one that is neither more nor less than sufficient." His definition of life is: "The continuous adjustment of internal relations to external relations."

As corollaries, death would be the cessation, and disease an interference with, such adjustment; mental disease becoming an interference with the continuous adjustment of internal relations to external relations requisite to intelligent actions.

Convulsions, sleep, mental preoccupation, fainting, it could be contended, are improperly included in that definition, as well as some nervous disorders not regarded as insanity; but the concluding words could shift the burden upon the definition of "intelligence."

There can be endless quarrels over any definition; such debates were common in benighted historical periods when scholasticism, or sophistry in general was considered erudition.

[1] Principles of Biology, I., chap. 4.

Spitzka[1] states that "none of the most recent German writers on insanity attempt to give a definition of insanity. The chief discussion of the possibility of concocting such a definition has taken place in the Anglo-Saxon countries; and this, for reasons it is not necessary to dilate on, indicates that the chief need for the definition is a medico-legal one. If this want were not the chief motor it is doubtful whether an English author on lunacy (Shepard) would have offered such a definition as 'Insanity is a disease of the neurine batteries of the brain' with such an object as his avowed one of puzzling the lawyers."

Lord Chief Justice Coleridge is said to have addressed a witness, when requested by counsel to define insanity: "I suppose you do not consider that that is possible, seeing that it assumes so many forms."

The best possible witness-stand definition of insanity is that it is "an absence of sanity," and the matter is thereupon dropped, with possibly a few words as to the reason for making such an answer. The question is usually asked by attorneys for the purpose of entrapping the witness.

In old times distinctions were made between lunacy and insanity, based upon the supposition that the moon's phases controlled the lunatic. Such arbitrary divisions could be as well carried to sickness and disease; the ailing and the unwell; though ladies conveniently monopolize the latter term, somewhat.

Attempts were made to restrict "unsoundness of mind" to such instances as delirium occurring in the course of fever, but as an insane person cannot be considered as of sound mind, confusion and misapprehension were unavoidable in using a term that had a general application, for special purposes.

"A lunatic, or *non compos mentis*, is one who hath had understanding, but by disease, grief, or other accident hath lost the use of his reason. A lunatic is, indeed, properly one that hath lucid intervals, sometimes enjoying his senses, and sometimes not, and that frequently depending upon the change of the moon."[2]

Coke preferred *non compos mentis* as the most legal term, in which, besides lunatics, was included the deaf, dumb, blind, and other "frenzied" persons who had lost their reason by disease, or

[1] Manual of Insanity, 19.

[2] Bl. Com. 304.

anyone incapable of conducting his own affairs. Idiots and demented drunkards would, unintentionally, also be included.

The idiot was one who "hath had no understanding from his nativity."[1] *Non compos mentis* included both idiocy and lunacy, its former meaning having expanded in the course of time. An insane person was "one whose mind is affected by general imbecility or is subject to one or more specific delusions." Imbecility was equivalent to dementia, and was not used in its present technical medical sense. Religious sects could each claim that the others were insane if the entertaining of delusions were the test of insanity.

Partial insanity meant, in law, that a person was "insane on one or more particular subjects only, and sane in other respects." Monomania, or what is now called paranoia, corresponded to the legal "partial insanity;" but "partial insanity" is liable to convey a false idea,—one can be both sick and well, a train can be off the track and on it, at the same instant, as consistently as a man can be partially insane,—and the term is used less and less.[2]

"Lunacy" is now synonymous with "insanity," and "lunatic" is defined to mean "every insane person, and every person being an idiot or lunatic or of unsound mind."[3]

In the Revised Statutes, and in any act or resolution of Congress passed subsequently to February 1, 1871, the words "insane person" and "lunatic" include every idiot, *non compos*, and insane person.[4]

[1] Bl. Com. 303.

[2] For legal discussion as to partial insanity, see chap. VII., II., p. 164.

[3] 8 & 9 Vict. chap. 100, § 94. See also 16 & 17 Vict. chap. 39.

[4] The courts have defined insanity in its different phases as follows:

Insanity in its legal aspect is a marked departure of an individual in his modes of thought, state of feeling, and course of action, habits, and tastes from his manifestations in this regard when in normal health. Re Jones, 2 Ohio Dec. 409.

Legal insanity is a disorder of the intellect. Re Forman's Will, 54 Barb. 274.

It is such a derangement of the mental faculties that the individual has lost the power of reasoning correctly. Waters v. Connecticut Mut. L. Ins. Co. 2 Fed. Rep. 892.

It is a diseased or disordered condition or malformation of the physical organs through which the mind receives impressions or manifests its operations, by which the will and judgment are impaired and the conduct ren-

dered irrational. Blackstone v. Standard Life & A. Ins. Co. 74 Mich. 592, 3 L. R. A. 486.

The term "insanity" means sickness of the mind, and is broad enough to include every species of mental aberration. State v. Wilner, 40 Wis. 304.

It embraces all grades and conditions, and is synonymous with unsoundness of mind. St. George v. Biddeford, 76 Me. 593.

Mental derangement is the prolonged departure, without adequate reasonable cause, from the state of feelings and modes of thinking essential to the individual when in health. Mudway v. Croft, 3 Curt. Eccl. Rep. 671.

Lunacy is that condition or habit in which the mind is directed by the will, but is wholly or partially misguided or erroneously governed by it, or it is the impairment of one or more of the faculties of the mind accompanied with or inducing a defect in the comparing faculty. Owing's Case, 1 Bland, Ch. 370, 17 Am. Dec. 311.

Delirium is that state of the mind in which it acts without being directed by the power of volition, which is wholly or partially suspended; what is commonly called delirium is always preceded and attended by a feverish and wholly diseased state of the body. Owing's Case, supra.

The word "crazy" in its proper sense implies a broken, shattered, or deranged mind, rather than one enfeebled by age or disease. Shaver v. McCarthy, 110 Pa. 339.

Monomania is that species of insanity in which the hallucination is confined to a single object or class of objects, or a limited number of objects. People v. Lake, 2 Park. Crim. Rep. 215.

Hallucination is a morbid error in one or more of the senses, a perception of objects which do not in fact make any impression upon the external senses. Staples v. Wellington, 58 Me. 453.

Dementia or madness is that species of insanity in which the person afflicted is rendered incapable of reasoning in consequence of functional disorder of the brain, not congenital or born with the person. People v. Lake, supra.

Senile dementia is that form of insanity in aged people marked by a slowness and weakness indicating a breaking down of the mental powers in advance of bodily decay. Hiett v. Shull, 36 W. Va. 561.

Dotage is that feebleness of the mental faculties which proceeds from old age, consisting of a diminution or decay of that intellectual power which was once possessed; it is the slow approach of death. Owing's Case, 1 Bland, Ch. 370, 17 Am. Dec. 311.

Idiocy is that condition in which a human creature has never had from birth the least glimmer of reason, and is utterly destitute of all those intellectual faculties by which man in general is mentally and peculiarly distinguished. Owing's Case, supra.

It consists of a total want of reasoning powers from malformation of the organ of thought at the time of birth. People v. Lake, 2 Park. Crim. Rep. 215.

An idiot is a person who is without mind from birth. Donegal's Case, 2 Ves. Sr. 407.

A sound mind is one wholly free from delusion, with all the intellectual faculties existing in a certain degree of vigor and harmony, the propensities, affections, and passions being under subordination of the judgment and will, the former being the controlling power, with a just perception of the natural connection or repugnancy of ideas. Duffield v. Robeson, 2 Harr. (Del.) 375.

The terms "disposing capacity of mind," "a sound mind," and "testamentary mind," are alternative or synonymous phrases in the law of wills. Clements v. McGinn (Cal.) 33 Pac. 920.

Unsoundness of mind consists of incapacity to struggle against delusion. Waring v. Waring, 12 Jur. 947.

The term "of unsound mind" when used in a legal sense means, not merely imbecility of mind, but is synonymous with *non compos mentis*, implying a total deprivation of reason, idiocy, lunacy, and adventitious madness, either temporary or permanent, remedial or irremedial. Jenkins v. Jenkins, 2 Dana, 103, 26 Am. Dec. 437.

As used in the New York statute concerning wills, it is synonymous with *non compos mentis*. Stanton v. Wetherwax, 16 Barb. 267.

As used in the Indiana statute with relation to insanity, it includes every species of insanity or mental unsoundness arising from whatever cause. Burhart v. Gladish, 123 Ind. 338; McCammon v. Cunningham, 108 Ind. 545; Walker v. State, 102 Ind. 502; Willett v. Porter, 42 Ind. 250. And insanity cannot be said to be a stronger term, or to include a greater degree of infirmity, than is implied in the phrase "unsound mind." McCammon v. Cunningham, 108 Ind. 545.

The words "unsound mind" as used in the Nebraska laws with reference to vacating or modifying judgments are used in the same sense as the word "insane," and import a total deprivation of reason. Witte v. Gilbert, 10 Neb. 539.

A person of unsound mind is an adult who from infirmity of mind is incapable of managing himself or his affairs; the term includes insane persons, idiots, and imbeciles. Clements v. McGinn (Cal.) 33 Pac. 920.

The term *non compos mentis* denotes neither mere mental weakness nor total deprivation or destruction of the mental powers, but simply unsoundness of mind, a diseased or unhealthy mind. Formerly, however, it was held to import a total deprivation of understanding. Jackson v. King, 4 Cow. 207, 15 Am. Dec. 354; Ex parte Barnsley, 3 Atk. 168.

The words "non sane memory," in the Statutes 7 Geo. II. chap. 14, include all persons of that description, whether idiots or lunatics. Carew v. Johnston, 2 Sch. & Lef. 280.

Weakness of mind is a sort of mental imbecility approaching to the condition of *non compos mentis*, and analogous to childishness and dotage. Owing's Case, 1 Bland, Ch. 370, 17 Am. Dec. 311. Weak minds differ only from strong ones in the extent and power of their faculties, but unless

W. C. Anderson[1] sums up the entire matter in his statement that "most of the definitions, so called, are merely sententious descriptions of the disease. It is impossible to frame a perfectly consistent definition. No words can comprise the different forms and characters the malady may assume. . . . The law, being neither a medical nor a metaphysical science, has no theory on the subject of diseases of the brain. It seeks practical rules which may be administered without inhumanity, for the security of society, by protecting it from crime. It holds every man responsible who is a free agent. 'Insanity' is really not a legal term."

Nevertheless, various more or less erroneous theories of insanity have been adopted by the law, and have been erected into "tests," remaining as Procrustean beds into which "legal insanity" must be made to fit.

At one time it was required that the patient should be unconscious of his disease to constitute him insane, in the face of the fact that often suicide results from a recognition of the insanity by the patient, and that the insane sometimes seek voluntary commitment.

Exemption of the insane from punishment, and the vitiation of some of their civil acts, led to the adoption of more or less erroneous "tests of insanity" at a time when the world was in comparative ignorance, particularly with regard to disease of any kind. Opinions concerning insanity as a disease have been changing through the labor, opportunities, observation, and study of alienists; and the legal view of insanity should be based upon demonstrated facts. On this point Isaac Ray[2] remarks: "That much of the jurisprudence of insanity, in times past, should bear the marks of the crude and imperfect notions that have been entertained of its pathological character, is not to be wondered at; but it is a matter of surprise that it should be adhered to, as if consecrated by age, long after it has ceased to be supported by the results of more extensive and better-conducted inquiries. It is to be feared that the principles laid down on this subject by legal

they betray symptoms of a total loss of understanding, or of idiocy or delusion, they cannot properly be considered unsound. Duffield v. Robeson, 2 Harr. (Del.) 375.

[1] Law Dict. (1890) 549.

[2] Medical Jurisprudence of Insanity, *Preliminary Views.*

authorities have been viewed with too much of that reverence which is naturally felt for opinions and practices of our ancestors; and that innovations have been too much regarded rather as the offspring of new-fangled theories than that of steady advancement of medical science."

An idiot was defined[1] as "one who cannot count or number twenty pence, nor who can tell who was his father or mother, nor how old he is, etc., so as it may appear that he hath no understanding of reason. But if he have sufficient understanding to know and understand his letters, and to read by teaching or information, he is not an idiot." Most idiots are capable of some instruction, and the one who may read and write quite well may be more profoundly idiotic than another who shows incapacity for such matters, but equal or greater ability in some other direction.

The English common law originally recognized but two kinds of insanity: idiocy and lunacy, both being classed as *non compotes mentis*. Attempts were made to distinguish those to whom the term could be applied. Lord Coke divides those who are *non compotes mentis* into: (1) An idiot, who from his nativity by a perpetual infirmity is *non compos;* (2) he that by sickness, grief, or other accident, wholly loseth his memory and understanding; (3) a lunatic that hath sometimes his understanding and sometimes not, and therefore he is called *non compos mentis* so long as he hath not understanding; (4) he that by his own vicious acts for a time depriveth himself of his memory and understanding, as he that is drunken.

Entire loss of memory and understanding occurs in only a few acute insanities and during the last stages of terminal dementia, so that a large proportion of the insane-asylum population would be excluded from Coke's second division; and as lucid intervals may or may not occur in many insanities the third division would exclude all but intermittent cases, except towards the period of convalescence, when lucid intervals are more common. Hence, a dangerously insane patient could not be legally insane in Coke's view until he wholly lost memory and understanding, or showed signs of intermittence of his lunacy.

[1] Fitzherbert, Natura Brevium, ed. 1652, 583.

Technical distinctions with no warrant in facts for their existence, when, as often happens, they are rigidly applied, are capable of working great wrong.

So many mentally infirm were found to have been omitted by these olden descriptions of what constituted *non compotes mentis*, that the *omnibus* "unsound mind" was created to gather in these neglected cases. Nor was there, by any means, agreement as to what constituted "unsoundness of mind." Lord Hardwicke[1] held that unsoundness of mind did not mean mere weakness of mind, but a depravity of reason or the want of it. Lord Eldon[2] mentioned an aged person "whose mind was the mind of a child. It was therefore, in that sense, imbecility and inability to manage his affairs, which constituted unsoundness of mind." Previously the same authority had issued a "commission of lunacy inquest in the case of one who was unable to act with any proper and provident management; liable to be robbed by anyone; under the imbecility of mind, not strictly insanity, but, as to the mischief, calling for as much protection as insanity."

The main issue, in many civil cases, is as to whether a person is capable of managing his own affairs or not, and the custom of fastening a wholly unnecessary designation, such as insanity, imbecility, or unsoundness of mind, upon the infirmity, and thus adding a stigma—for such it is in popular estimation—to the misfortune, should be abandoned. It should suffice that the person is incapacitated "by reason of sickness," which would be a merciful and just substitute for the often less accurate term denoting some kind of mental impairment, the boundaries and precise application of which are often beyond the knowledge of anyone, particularly jurors, who are often uneducated and incapable of understanding such fine distinctions as the difference between unsoundness of mind and insanity, even when explained to them. Any juror can understand that the head may not be right through sickness, old age, etc.

Test. Lord Hale,[3] conceiving that only the strength and capacity of the mind were affected by insanity, originated a test of criminal responsibility: "Such a person as, laboring under mel-

[1] Ex parte Barnsley, 3 Atk. 168.
[2] Haslam, Medical Jurisprudence as it Relates to Insanity, 336.
[3] Pleas of the Crown, 30.

ancholy distempers, hath yet ordinarily as great understanding as ordinarily a child of fourteen hath, is such a person as may be guilty of treason or felony."

The pernicious influence of that "test" is mentioned by every writer on insanity since its establishment. There is vastly more than mere capacity and strength of mind involved in insanity, but in Lord Hale's view every child of thirteen would be insane, or all insane would be of the mental gauge of such children.

Justice Tracy[1] followed Hale in observing "that it is not every kind of frantic humor, or something unaccountable in the man's actions, that points him out to be such a madman as is to be exempted from punishment; it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast; such a one is never the object of punishment."

A short residence in an insane asylum would be a valuable part of a legal course for jurists who frame *dicta* concerning insanity and its possibilities. Tracy would have seen in such institutions multitudes of insane who were fully capable of crimes, and yet who could not be, even at the time of committing crime, regarded as deprived of their understanding to the extent he mentions.

Sir Vicary Gibbs, the English attorney general, on the trial of Bellingham in 1812, declared that "a man may be deranged in his mind, his intellect may be insufficient for enabling him to conduct the common affairs of life, such as disposing of his property, or judging of the claims which his respective relations have upon him; and if he be so, the administration of the country will take his affairs into their management and appoint to him trustees; but at the same time, such a man is not discharged from his responsibility for criminal acts."[2]

French commentators accused Hale and his school of "making more account of property than of life." Virtually, the claim is thus made that the mind is less influenced by insanity in meditating a crime than when making a contract or will.

The French Penal Code exempts madness, unconditionally,

[1] Arnold's Case (1723), 16 How. St. Tr. 764, Harg. St. Tr. 322.
[2] 1 Collinson, Lunacy, 657.

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from punishment: "There is no crime nor offense when the accused was in a state of madness at the time of the action."[1]

Georget[2] speaks of the effect of special verdicts allowed in France, in which juries may declare whether the accused was guilty or not guilty, sane or insane, and whether or not the act was committed voluntarily. On one occasion he cites, a verdict was returned that the accused acted voluntarily and with premeditation, and, secondly, that he was insane at the time of committing the act. By this it was declared that the accused possessed the will of a madman, a merely animal will, which excludes culpability.

Erskine, in the defense of Hadfield for shooting at the King in Drury Lane theatre in 1800, challenged the attorney general to show that there was any madness in the world consisting in "a total deprivation of memory and understanding."

Epileptic furor, stuporous insanity, idiocy, and delirium grave might be placed in that category, as without memory or understanding; but a great range of insanities, in which criminal offenses are much more likely to be committed, is left out of account by the provision that memory and understanding must be absent.

Delusion as a test of insanity was proposed by Erskine, and subsequently he secured the acquittal of a young woman indicted for murder who acted without delusion upon facts which created insane jealousy.[3]

The delusion test of irresponsible insanity was sanctioned by Sir John Nicholl.[4] "The true criterion," says he, "the true test, of the absence or presence of insanity, I take to be the absence or presence of what, used in a certain sense of it, is comprisable in a single term, namely, 'delusion.' . . . In short, I look upon delusion in this sense of it, and insanity, to be almost, if not altogether, convertible terms. . . On the contrary, in the absence of any such delusion, with whatever extravagances a supposed lunatic may be justly chargeable, and how like soever to a real madman he may either think or act on some one or on all

[1] Art. 64. Quoted by Ray, op. cit. 19.
[2] Des Maladies Mentales, 100.
[3] Erskine's Speeches, quoted by Ray, op. cit. 37.
[4] Dew v. Clark, 3 Add. Eccl. Rep. 79.

subjects, still, in the absence, I repeat, of anything in the nature of a delusion, so understood as above, the supposed lunatic is, in my judgment, not properly or essentially insane."

It would be proper enough, as in the instance of *Com.* v. *Rogers*,[1] in Massachusetts, 1844, to make delusion an accessory test, but not the sole one. In that case it was decided that "where the delusion of a party is such that he has a real and firm belief of the existence of a fact which is wholly imaginary, and under that insane belief he does an act which would be justifiable if such fact existed, he is not responsible for such act."

In *Guiteau's Case*,[2] in 1881, an insane delusion was defined as "an unreasoning and incorrigible belief in the existence of facts which are either impossible absolutely, or at least impossible under the circumstances of the individual;" and it was said that "opinions or beliefs founded on reasoning and reflection are not insane delusions nor within the law regarding them."[3]

As to Sir John Nicholl's idea that delusion must be present to constitute insanity, there would be considerable difficulty in establishing either the existence or the absence of delusion in many insanities, with or without aggressive acts, such as epileptic, stuporous, confusional, or atheromatous insanities; or in imbecility (particularly the *sine delirio* form of Spitzka, or moral imbecility); in transitory frenzy, delirium grave, or the various dementias, such as are caused by destructive brain disease. In fact, in some of these states, where stupor and impulsive acts are associated, and there is no remembrance of what has been done, it is mere assumption to claim that delusion instigated the act, because the latter appears to have been so induced.

It would not require a very astute lawyer, particularly if he possessed a little precise knowledge such as a short residence in an insane asylum would furnish, to pull such definitions to pieces. The Massachusetts decision is probably fair, but not far-reaching enough, for an insane delusion may lead to the perpetration of acts that would not be justified by the existence of facts. In the *Guiteau Case*, the definition requires "unreasoning and incorri-

[1] 7 Met. 500, 41 Am. Dec. 458; Bennett & H. Lead. Cas. Crim. Law, 95.

[2] 10 Fed. Rep. 161.

[3] For further citations as to delusions, see chap. VII., II., § 3, and chap. IX.

gible belief in the existence of facts which are impossible absolutely, or impossible under the circumstances of the individual;" whereas a delusion may be founded upon insane reasoning which may be quite as logical as is usual among average, ordinary persons, and even more so than with them; the delusion may not be incorrigible, for it may assume some new form under insane reasoning or the persuasion of others; the facts may not be impossible, and frequently they may actually exist; the entire delusion may be in the interpretation of the facts; and the facts may be not impossible for the same reason, under the circumstances of the individual. The conclusion that reasoning and reflection are not factors in insane delusions is known to every thoughtful person who has observed insane reason and reflection to be an error. It often puzzles asylum officials to distinguish them from sane reason and reflection; sometimes the same patient may mix both kinds, or at times show more of one kind than the other.

A recent definition[1] holds that "a delusion is a belief in facts the existence of which no rational person would believe. Such delusion in order to be a test of insanity must be a delusion of the senses, or such as concern facts. Mere beliefs on questions of opinion, however absurd, are not a proper test where a person is affected with a delusion upon one specific subject but is rational in other respects; he is considered insane upon that subject, but not on other subjects."

A person may be rational and overdraw his bank account under a miscalculation, but nevertheless he is under a delusion. Illusion of the senses leads to universal delusions; refraction causes the sun to appear above when it is really below the horizon. Instruction causes the admission of the rotundity of the earth when the unaided senses impress us with its flatness; the uneducated person labors under the delusion that the earth is flat, and yet he cannot be considered irrational because of his want of education. No rational person in Aristotle's time would believe that the earth was round, and that philosopher, after a few statements as to the plausibility of such a supposition, dismisses the matter by saying: "But reason teaches us that the earth is flat." What a rational person would not believe in one period may be

[1] 11 Am. & Eng. Enc. Law, 107, 103.

accepted later by other rational persons. And in fact the mere admission of the globular shape of the earth does not argue rationality, for the vast majority merely adopt the statement secondhand, and cannot advance a single reason in its support. The perspective illusion of vanishing lines can be regarded as the basis of delusion. A delusion upon a specific subject may be compatible with sanity or with insanity. In fact, delusion in itself cannot be made a criterion of insanity. Circumstances may make a sane delusion an insane one, or the reverse. The delusion may assist in the determination of insanity, but no hard and fast lines of any definition can contain all insane as distinguished from sane delusions.

Wharton[1] cites the instance of the Mormon prophets who were influenced by delusions respecting their revelations, and claims that the sanity of the Mormons shows that the delusion is not an insane one; and this strikes at the root of the entire matter. The only difference possible to establish between sane and insane delusions, in a general way, is that in one case the delusion is entertained by an insane person, and in the other case by a sane one; and the delusion must be established as insane by proof of the insanity of the person, irrespective of the delusion. A "sane delusion" may be held by an insane patient, and what could be, at times, considered insane delusions, may also be entertained by rational persons. At one time the belief in witches rested upon the very best of human testimony; at this time such a belief would raise a question of sanity in its entertainer, though quite as absurd things are held to be true by people whose rationality in general is never questioned.

So, instead of proving the insanity by the delusion, Judge Wharton seeks to prove the insanity of the delusion by the insanity, casting out erroneous beliefs held by the sane persons, however delusional they may appear, *because* such persons are sane.

Thus, jurists may delude themselves that an effect proves the cause, in taking a symptom, such as a delusion, as a test of insanity, just as a cough could be claimed to prove consumption; whether or not insanity in the one case, or consumption in the other, could be maintained by other proof. If the law holds

[1] Criminal Law, 8th ed. 84, etc.

that the cough is the sole criterion of consumption, then pathology should legally have nothing more to say on the subject. But the law might discriminate between coughs in general and consumptive coughs, or, in other words, coughs peculiar to consumption. As the only effectual way to ascertain whether the cough were really consumptive or not would be to find whether consumption actually existed, thus an insane delusion may be known by the insanity of the person who entertained it; and as a consumptive may have some other kind of a cough, so an insane person may hold a sane delusion.

The Right and Wrong Test is generally accepted in the United States. It consists in the inability to distinguish between right and wrong as to the act charged as a crime. In some states it is the exclusive test of such insanity as exempts from responsibility.

Many of the inconsistent maxims in English law pertaining to insanity may have arisen from the fact that, except in trials for high treason, the accused was not allowed counsel to speak in his defense; so that ancient *dicta* were repeated without question, and have influenced all succeeding English and American decisions.

Whenever during the "night of time" the right and wrong test may have been first announced, it was alternately ignored and reinstated; abandoned in the case of Hadfield; reaffirmed in that of Bellingham; again lost sight of in the trial of Jonathan Martin;[1] and modified by Lord Lyndhurst[2] in directing that the prisoner be acquitted if "he did not know, when he committed the act, what the effect of it, if fatal, would be with reference to the crime of murder;" and in 1837 Mr. Justice Park[3] held that "sufficient knowledge to discriminate between right and wrong" was the proper construction. Three years later, in *Reg.* v. *Oxford*, Lord Chief Justice Denman[4] made the question read "whether the prisoner was laboring under that species of insanity which satisfies you [the jury] that he was quite unaware of the nature, character, and consequences of the act he was com-

[1] York Minster Arson Case.
Rex v. Offord, 5 Car. & P. 168.
[3] Trial of Greensmith, Ray, op. cit. 42.
[4] 9 Car. & P. 525.

mitting, or, in other words, whether he was under the influence of a diseased mind, and was really unconscious, at the time of committing the act, that it was a crime."

McNaughton, in London, in 1843, killed Drummond, the private secretary of Sir Robert Peel. It was proved that McNaughton suffered from delusions of persecution, though behaving himself with propriety generally, and not exhibiting very obvious insanity. In deference to the popular clamor the House of Lords propounded to the Judiciary certain questions relative to the laws of England on the subject of insanity as a defense in criminal actions. The delusional test was doubted as a proper exculpatory plea.

In answer to the first query the judges replied to the effect that though an act was the product of an insane delusion, if the person knew that he was acting contrary to the law he is nevertheless punishable.

To the second and third questions the response was that. "to establish a defense on the grounds of insanity it must be clearly proved that at the time of committing the act the party accused was laboring under such defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong with reference to the particular act with which he is charged."

The reply to the fourth question was on the assumption "that if he labors under partial delusion only, and is not in other respects insane, he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of delusion, he supposed another man to be in the act of attempting to take away his life, and he killed the man, as he supposes in self-defense, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for his supposed injury, he would be liable to punishment."

Great ignorance of the nature of insanity is displayed in these answers, which seem to have been constructed with special reference to the popular wishes in the particular instance of McNaughton's offense.

Insanity is the result of disease, and those who make a life work of studying it are more competent to pass upon associated matters than others who have not done so, or who have come in contact with one phase of it only, as the undertaker sees the final result of sickness in some cases, without claiming to be a physician.

Transferring the same misapplied general ability of the judges to other questions of pathology of which they were just as ignorant, we could suppose a case:

The loud coughing of a hospital patient disturbs the repose of his fellows, and various opinions are advanced, to the effect that he could restrain the nuisance; that he is not consumptive, and therefore he has no right to cough. The desire is general for his removal, but a pretext must be found in order to hold him responsible for voluntarily annoying others. Instead of seeking the advice of physicians concerning the matter, the president and board of directors summon the warden and trustees, who are intelligent laymen desirous of pleasing both the higher authorities and the hospital inmates, and propound questions implying a doubt that cough alone would justify annoying others, and suggesting that probably some other symptom should be associated with the cough to make it the irresponsible one of phthisis; they therefore wish a thorough, but sententious, expression concerning coughs in general and that of pulmonary consumption in particular.

The answers made are that, assuming the inquiry to be confined to those persons who labor under "partial" coughs only, and are not in other respects consumptives, then, notwithstanding he could not help coughing, if he knew at the time he was violating hospital rules he should be held responsible. Further, that to be exculpated on the grounds of consumption, it must be clearly proved that at the time of coughing the party was laboring under such defect of the respiratory apparatus as to be unaware that he was coughing or that he was doing wrong.

To the last question: If any person, under a consumptive impulse, coughs disagreeably to others in consequence thereof, is he excused? — the reply is, assuming that he labors under "partial" cough only, and is not in other respects consumptive, he must be considered in the same situation as to responsibility

as if there were real occasion for the cough. For example, one who coughed when he was frightened and merely imagined that he had occasion for the fright would be exempt from punishment, but if he merely imagined that he was about to be frightened, or put to some lesser inconvenience, then he would be liable to punishment for coughing, whether he were consumptive or not.

As puerile as the comparison sounds, it is scarcely overstrained. According to the judges' replies, the insane man must act reasonably; he must obey impulses of delusions only under certain circumstances common to sane persons,—as though the presence of the insane delusion were not likely to be accompanied with other faults of mentality.

As Ray[1] says: "This is virtually saying to a man: You are allowed to be insane; the disease is a visitation of Providence, and you cannot help it: but have a care how you manifest your insanity; there must be method in your madness. Having once adopted your delusion all the subsequent steps connected with it must conform to the strictest requirements of reason and propriety. If you are caught tripping in your logic; if in the disturbance of your moral and intellectual perceptions you take a step for which a sane man would be punished, insanity will be no bar to your punishment. In short, having become fairly enveloped in the clouds of mental disorder, the law expects you will move as discreetly and circumspectly as if the undimmed light of reason were shining upon your path."

The relativity of right and wrong; the fact that what may be wrong under certain circumstances may be right under others; the question of *fas et nefas* of the ages; the question of Pontius Pilate on the arraignment of Christ; the inability to establish any universal standard of abstract right and wrong,—questions over which pundits and sages, from the earliest times, have puzzled,—are presumed to have been solved by the insane person who commits a crime. A paranoiac may know right from wrong, even as to the particular crime he commits, and he may also have the power to choose between the right and wrong as generally understood, and may not be irresistibly or impulsively

[1] Op. cit. p. 47, § 34.

controlled; but his will power and his reason are as insane as the other faculties of his mind, and he may be, and often is, influenced by what he considers higher ideas of right and wrong. The ideas of right and wrong prevalent in Lord Bacon's day condemned Bishop Cranmer to the stake, and enthusiastic martyrs of all sects could have no greater conviction of the injustice of their persecutors than has the ordinary paranoiac. If the knowledge of right and wrong were such a simple thing, or intuitive, there would be no need of instruction for the young, or of legislation to adjust the ever shifting conceptions of the subject. Lord Lyndhurst,[1] in the debate in the House of Lords occasioned by the McNaughton trial, remarked, inconsistently with his other expressed opinions, that sane persons differ in their views of right and wrong, and, though he knew what the learned judges meant by right and wrong, he was not sure that the public at large did, especially juries. As to the means by which it may be inferred that an insane person knows right from wrong it was declared by the attorney general in the trial of Bellingham[2] that, "even if insanity in all his other acts had been manifest, yet in the *systematic correctness* with which the prisoner contrived the murder he showed that he possessed a mind at the time capable of distinguishing right from wrong." Design, cunning, careful preparation, and execution of plans are common exhibitions of insanity; delusions may be hidden or denied; dissimulation and simulation are resorted to, to carry out suicidal or other plans; and inventive genius may not only exist, but be increased by insanity, and practical machinery has been perfected by lunatics, apart from or in connection with insane motives. In the *Guiteau Case* it was remarked in the charge to the jury that "indifference to what is right is not ignorance of it, and depravity is not insanity." It can be contended, also, that indifference to the right and depravity are not generally indications of sanity. In fact the very things that are most frequently observed among the insane are urged as proof that they are not insane.

Originally the test consisted in knowledge of right and wrong in the abstract, as stated in Judge Mansfield's charge in the *Bell-*

[1] Hansard, Parliamentary Debates, 67, 714.

[2] Ray, op. cit. 34.

ingham Case,[1] but in *Rex* v. *Offord*[2] and *Reg.* v. *Oxford*,[3] and finally in the joint answer of the judges growing out of the *McNaughton Case*, the test became the knowledge of right and wrong as applied to the particular case, which latter has found more general favor in the American courts than the "child test," "wild beast test," "or abstract right and wrong test." In *Erwin* v. *State*[4] it was held that a charge which makes the test of insanity depend upon whether the prisoner knew right from wrong generally, instead of with respect to the act for which he is indicted, is erroneous.

A decision that would be liable to involve a contradiction was reached in *Roberts* v. *State*,[5] that if a man has not reason sufficient to enable him to distinguish between right and wrong in relation to the particular act, he is not punishable. Nor is he punishable where, in consequence of some delusion, the will is overmastered and there is no criminal intent.

For an insane person may know right from wrong, as ordinarily understood, and be held accountable, under the first clause of the decision, and be exculpated under the last provision of the opinion.

Another modification of the particular right and wrong test appears clearly stated in *Smith* v. *Com.*,[6] in the words: "The test of responsibility is whether the accused had sufficient reason to know right from wrong, and whether or not he had sufficient power of control to govern his actions."

In *Wright* v. *People*,[7] "uncontrollable impulse," and in *State* v. *Johnson*,[8] "irresistible impulse," are added to the "particular right and wrong test." With a return to the "abstract right and wrong test," the New York supreme court adds: "If he had sufficient power to know it, whether he had sufficient power to govern his actions is a matter of no moment whatever."[9] Dr. Spitzka tes-

[1] 1 Collinson, Lunacy, 630.
[2] (1831) 5 Car. & P. 169.
[3] (1840) 9 Car. & P. 525.
[4] 10 Tex. App. 700.
[5] 3 Ga. 310.
[6] 1 Duv. (Ky.) 224.
[7] 4 Neb. 407.
[8] 40 Conn. 136.
[9] Walker v. People, 26 Hun, 67, 1 N. Y. Crim. Rep. 7.

tified that the prisoner in this case was shamming, and was sane- and on the trial conviction followed from inability to prove in; sanity. The same case came before the New York court of appeals the succeeding year, and the judgment was affirmed. In his charge the recorder refused to add to the right and wrong proposition the further one, "and whether or no he (the accused) had sufficient power of control to govern his actions." Held, that the refusal was proper, as the recorder had charged that the accused must have sufficient control of his mental faculties to form criminal intent before he can be held responsible for a criminal act, which is as far as the court should go on the subject of control.

While there is no doubt of the justice of the sentencing of the prisoner for abducting the children, some parts of the decision would condemn insane persons for irresponsible acts. Obsessed persons, those who have irresistible homicidal, suicidal, and other impulses, may know right from wrong, and strive earnestly to control themselves properly, but are absolutely unable to do so. Then, again, the criminal intent may be formed by an insane person, and there may be sufficient control of the mental faculties to form that intent; but such facts would by no means indicate to the alienist that the person was sane.

That there is no test of insanity, that every case must be considered by itself, and the insane person must be compared with his former self, was essentially the revolutionary decision of Mr. Justice Doe, in *State* v. *Pike*;[1] and the following year the supreme court of New Hampshire again decided that there was no legal test of insanity.

In the first case referred to, Justice Doe stated that "this is the first instance in which such instructions were ever given; but they are an application of ancient and fundamental principles of the common law. *A product of mental disease is not a contract, a will, or a crime, and the tests of mental disease are matters of fact.*"

Justice Doe[2] had previously, in a civil case, held to the same effect. "Tried by the standard of legal precedent," he said, "the

[1] (1870) 49 N. H. 399, 6 Am. Rep. 533.

[2] Boardman v. Woodman, 47 N. H. 147-150.

instructions are wrong; *tried by the standard of legal principles, they are right.*"

In the case of *State* v. *Jones*,[1] referred to, on the trial of the indictment for murder the jury were instructed "that if the defendant killed his wife in a manner that would be criminal and unlawful if the defendant was sane, the verdict should be 'not guilty by reason of insanity,' if the killing was the offspring or product of mental disease in the defendant." Held, correct.

In these cases the supreme court of New Hampshire discarded all tests of insanity adopted by other courts as rules of law, and held that insanity is a mental disease; that whether the defendant had a mental disease, and whether the act charged as crime was the product of such disease, are the decisive questions, and they are questions of fact for the jury. Accordingly the same court holds that it is not competent for a witness who is not an expert to give his opinion as to the sanity of the defendant.

In an opinion concerning the right and wrong test the supreme court of Indiana, in *Stevens* v. *State*,[2] refers to Chief Justice Perley's charge in *State* v. *Pike* as the true law on the subject, and decides, in effect, that there is no legal test of insanity. If an insane impulse leads to the commission of a crime, the actor is not responsible. An instruction that if the jury believe "that the defendant knew the difference between right and wrong in respect to the act in question, if he was conscious that such act was one which he ought not to do," he was responsible for his act, is erroneous. Also upon an indictment for murder where the defense is insanity the jury should acquit if they entertain a reasonable doubt as to the soundness of mind of the prisoner at the time of the homicide, although they believe he had judgment and reason sufficient to discriminate between right and wrong in the ordinary affairs of life. He is as much entitled to the benefit of a doubt on that as on any other material fact in the case.

In *Hopps* v. *People*[3] it was held that "wherever it shall appear from the evidence that at the time of doing the act charged the prisoner was . . . affected with insanity, and such affection was the efficient cause of the act, and that he would not have

[1] 50 N. H. 369, 9 Am. Rep. 242.
[2] 31 Ind. 485, 99 Am. Dec. 634.
[3] (1863) 31 Ill. 385, 83 Am. Dec. 231.

done the act but for that affection, he ought to be acquitted." This antedated the New Hampshire decision by several years, though it has but little influence upon Illinois practice, for the "particular right and wrong test," with the added proviso that there was sufficient ability to control actions, is invariably applied in criminal cases in that state where insanity is the defense.

The New Hampshire decision referred to as a decided advance in conceptions of insanity tests is reported in full in chapter VII., I., appendix to § 8.[1]

[1] For further tests as adopted by courts, see chap. VII., I.

CHAPTER III.

CLASSIFICATION.

Mania was synonymous with insanity, originally and until 1621, when Burton's Anatomy of Melancholy induced a popular division of mental disease into states of exaltation and depression, which primitive separation appeals so forcibly to uneducated "common sense" that educated common sense, as Huxley calls science, has had difficulty in overcoming its allurements. Exaltation and depression cannot possibly describe insanities which may change from the one to the other condition, or which cannot be included under either term. "Lunacy" appeared when the announcement was made that the moon was associated with some forms of insanity. Gall and Spurzheim, followed by Connolly and W. A. F. Brown, attempted a phrenological classification based upon the assumption that the mind was divisible into certain faculties which influenced behavior; but, though so thoughtful a writer as Isaac Ray was somewhat attracted to the claims of phrenology, recent alienists can find nothing in it of use in connection with mental studies. Its originators were, however, advanced in knowledge beyond their time, and I have suggested[1] that the few ideas of value evolved by them should be considered in connection with modern brain studies.

Parchappe suggested a division of insanities according to the diseased states which induced them, and though August Voisin, fifty years later, attempted a similar pathological classification, not enough is known as to the pathology of insanity to justify a nomenclature exclusively founded on diseased states. There is justification for a partial pathological classification based on a few organic and toxic disorders with the atheromatous insanity which Voisin announced. Laycock divided insanities into disturbances of certain assumed physiological divisions of the mind.

Pinel, Esquirol, and Cullen improved the classification materi-

[1] "Cerebrology and Phrenology," American Naturalist, July, 1888; "Brain Centers," American Naturalist, Sept., 1892.

ally by adopting symptoms as points of departure, but even this symptomatological classification is insufficient and erroneous.

Heinroth, Ideler, and Hoffbauer analyzed the mind as consisting of intellectual faculties, moral dispositions, and the will, which latter included the propensities; and their list of mental diseases had reference to disorders of such divisions of the mind. Their school was known as the psychological. In 1830 Max Jacobi, and later his followers, Nasse and Friedreich, classified insanities according to the part of the body affected, but naturally failed to establish their theories. The etiological or causative classification was originated by Belhomme, in 1834, and Schroeder van der Kolk, in 1852; which method has been somewhat followed by Skae and Clouston.

Bucknill combined a mental and pathological enumeration. Since Spitzka's advocacy of a mixed practical classification, in 1883, the Antwerp Congress of Mental Medicine in 1885, and the alienists of Great Britain, have followed a composite system made up of symptoms, pathological and etiological indications.

Spitzka's method[1] was to group all insanities into the "pure" and "complicating." The first of these he subdivided into simple insanities which were not essentially the manifestation of a constitutional neurotic condition; these were classed as they were or were not associated with demonstrable active organic changes of the brain. His second sub-group was made up of the constitutional insanities essentially the expression of a continuous neurotic condition, classed according to their dependence upon or independence of the great neuroses.

Under these headings were gathered into one series: simple mania, simple melancholia, katatonia, transitory frenzy, stuporous insanity, primary confusional insanity, primary deterioration (atheromatous insanity), secondary confusional insanity (an early stage of terminal dementia), terminal dementia; into another series fall senile dementia and hebephrenia; still another embraces paretic dementia, syphilitic dementia, dementia from coarse brain disease, and delirium grave. Then alcoholic, hysterical, and epileptic insanities are placed together. Periodical insanity, idiocy, imbecility, cretinism, and paranoia, finally include

[1] Manual of Insanity, 126.

the remainder, with the exception of "complicating insanities," in which are traumatic, choreic, post-febrile, rheumatic, gouty, phthisical, sympathetic, and pellagrous insanities.

Utility should govern the construction of the classification; and, while recognizing the impossibility of creating any unassailable fabric of the kind, the different mental ailments are separated in this work under chapter headings comprising such a rational and natural system as I thought would best meet the requirements of both the legal and medical professions:

Alcoholism: acute alcoholism; chronic alcoholism; post alcoholic conditions; delirium tremens; alcoholic trance; dipsomania; oinomania; alcoholic paretic dementia; chronic alcoholic insanity; alcoholic dementia.

Morphinism, and Allied Addictions: insanities due to the addictions.

Head Injuries: traumatic insanity; traumatic dementia; traumatic imbecility; traumatic paretic dementia.

Degeneracy: cerebral neurasthenia (including obsessions); paranoia; idiocy; imbecility.

Age: senility; senile dementia; the climacteric; climacteric insanity; puberty; masturbatory insanity; hebephrenia.

Vesanias: delirium; mania; hypochondriasis; melancholia; post-febrile insanity; stuporous insanity; confusional insanity; transitory frenzy.

Childbirth: pregnancy; puerperal insanity; lactational insanity.

Periodicity: periodical insanity; periodical mania; periodical melancholia; katatonia; circular insanity.

Epilepsy: mental epilepsy; epileptic insanity.

Hysteria: mental hysteria; hysterical insanity.

Phthisis: phthisical insanity.

Rheumatism and Gout: rheumatic insanity; gouty insanity.

Destructive Brain Disease: organic brain disease; atheromatous insanity; delirium grave; syphilitic paretic dementia; syphilitic dementia; paretic dementia; terminal dementia.

Etiology, pathology and symptoms, indifferently, contribute to such a classification; with the advantage of some readiness of reference, and avoidance of the obscurity which attends a more labored grouping.

No form of insanity can be rigidly classed with other forms having some characteristics in common, for it will be found that such special disorder also contains peculiarities that would allow it to be associated with other forms of insanity, and different stages of a disease would require change from one type to another. What may be functional at one stage may later become organic. A noticeable difficulty is illustrated by the fact that under "head injury," a special insanity called traumatic can be singled out as particularly falling under that heading, while numerous other insanities caused by head injuries must be mentioned in connection with that topic, which are referred to also under other divisions. But any and every endeavor to make a complete classification will be baffled by inherent obstacles, and the only excuse offered for the classification adopted is that it, at least, reduces, to some extent, the confusion and obscurity that often unnecessarily envelop the subject.[1]

[1] The law does not recognize the division of insanity into numerous varieties, though convenient for purposes of description, insanity in the legal sense embracing all grades and conditions, being synonymous with unsoundness of mind. St. George v. Biddeford, 76 Me. 593.

CHAPTER IV.

SYMPTOMS.

The symptoms of insanity are best studied in an asylum under physicians experienced in both mental and bodily diseases, and with the aid of the recorded observations of specialists who have written during the past two centuries.

Nearly all the patients of such an institution may at one time be seen walking about the grounds, or seated in groups upon the lawn; and they could be readily mistaken for the patients of an ordinary hospital. Apathy and a general appearance of debility prevail among them, with here and there a little restlessness.

In some asylums two thirds of the inmates may be employed at some kind of work; a few are as efficient as workmen are elsewhere, while many can do but little towards the maintenance of the place; but were it not for the fact that the majority of the insane are able to do work of some kind the expense of keeping up such colonies would be very much greater than it is at present. Probably it would be fair to estimate the work of the insane at one fourth that of the efficiency of the sane; or, as it is often stated, it takes about four patients to do what one sane person can do.

Routine work alone, as a rule, is possible to people who lack so much mental initiative; and there is a constant necessity of overseeing what is done by them, owing to their inattention, rather than to their physical weakness.

Female patients may be seen quietly at work in the asylum sewing room; in the laundry the stronger women are employed; and here and there are occasional maniacal demonstrations, owing to the superabundant energy of such patients, which causes them to be selected for laundry work. In the asylum printing office compositors are calmly setting type, reading proof, and making up forms; pressmen are operating hand, foot, and steam presses; in the various factories of the place cabinetmaking, coopering, and skilled work of various other kinds, in cloths, leather, metal, or

wood may be carried on. Insane clerks assist in the bookkeeping of the establishment; patients assist in the cooking, housework, painting, and repairing generally. Patients help at the stables and in the care of the stock; even landscape gardening and much other artistic work are occasionally performed by them. In short, nearly everything that patients may have previously learned, either before or after becoming insane, may be more or less accurately and faithfully performed by them.

An asylum band with wind or string instruments may be largely composed of patients, and creditable piano performers are occasionally found among even the hopelessly demented.

Patients attend chapel services, lectures, performances, and dances, and observe the proprieties at such times to a remarkable degree. In fact, all the possible self-control they can exert seems to be called into requisition during, and in anticipation of, entertainments. When certain days are regularly set apart for such assemblages it is noticed that the patients generally are "on their good behavior" at such times, even though "disturbed" during other days.

Chronic alcoholic lunatics are the most troublesome inmates of the asylum, because their apparent sanity secures privileges for them which they occasionally abuse by breaking their parole and getting drunk, or escaping. The proverbial cunning of some of the insane may be exercised in dissimulation, or concealing their insanity. The advice will often be tendered by one patient to another not to do or say certain things if he wishes to convince the physician that he has recovered; and occasionally a patient is found with self control enough to successfully hide his insanity.

Among the well behaved patients are many who are convalescing or have just recovered, some who are enjoying remissions of their insanity, the so-called lucid intervals; others may appear to be sane upon casual inspection; they may converse intelligently within the limits of what would be expected from estimates of their social positions, and, nevertheless, there may be among these quite dangerous paranoiacs, as well as numerous other chronic insane. While inversion of character is the rule, in many instances previous training, education, and mental capabilities go a long way towards modifying the insane exhibitions of some patients. Native politeness, considerateness,

affection, the lady, and the gentleman, may persist; but not always, for, in spite of the best previous circumstances, character, and surroundings, there may be disgusting offensiveness; and insane women are notoriously more obscene, blasphemous, and indecent than are men with the same kind of mental disorder.

Premeditation, design, deliberation, malice, and provocation are exhibited by numbers of the insane who are engaged in work that requires planning, forethought, patience, and ingenuity. For example, an insane artist may continuously work at a painting by observation and study that require reference to historical and other books; he will sketch his studies and elaborate them on canvas, and to secure the means to purchase material he will paint "pot boilers" or do ornamental decorating for a consideration,—all with reference to completing his artistic work. Possibly furious outbreaks or periods of depression may interrupt such labor, and something in the subject or manner of the painting may indicate the unsoundness of the mental state; but, on the other hand, nothing of the kind may occur, and the insanity may be profound and have no relation to the undertaking. In some cases this ability to think and plan ahead may be associated directly with the insanity and determine its acts; hence deliberation, premeditation, and design are not inconsistent with insanity in some of its forms, and may be exercised under provocation, or from malicious motives, such as might influence a sane person to acts of retaliation or criminality.

The legions of tramps contain many insane; some could be classed as drunken insane and other as insane drunkards, while others still do not use liquor, and are what is known in Germany as the *Vagabundenwahnsinn*, sufferers.

Business ability is lessened in the great majority of insane cases, but among a few business capacity may be markedly increased. Paretic dements in the beginning of the exhilarated stage of their malady, and patients with simple mania, as well as some paranoiacs, may develop an astonishing commercial aptitude, comparable to the successful "sprinting" of some alcoholic board of trade men. The recklessness of insanity caused by drinking habits may be accompanied by an exaltation of the intellectual faculties necessary to the conduct of business on a large

scale, or the insanity, or alcoholism, may suppress considerations and sentiments which previously held the operator in check.

A large majority of asylum inmates are easily managed, and patients are usually separated into wards according to their behavior or needs. The epileptics can be trusted to care for one another during their occasional convulsions and furies, and as most of them are fairly rational between attacks, and rarely more than one patient at a time needs attention, their fellow feeling can be depended upon for mutual assistance. Some of the epileptics are allowed much liberty, though the danger of outbreaks demands systematic oversight of most of them. The furious patients are kept in wards that are necessarily somewhat barren of furniture and other movables that can be destroyed or converted into weapons; and the filthiness of many compels their separation from the tidier classes, in special wards where water can be used freely and frequent changes of clothing made. Of course the dress of patients must be adjusted to their inclinations to destroy and soil clothing.

Changes in the conduct of patients require their removal to appropriate wards. It would be unjust to convalescent cases to inflict upon them the presence of a turbulent person, nor would it do the latter any good; rather the reverse, for some self-control is occasionally exerted by the patient in the hope of promotion to a better ward, and the fear of removal may help to suppress an outbreak that would occasion the change. But the influence is only in a few cases, and by no means commonly regulates the actions. The patients are not only generally in a state of unstable equilibrium, but usually are wholly irresponsible. Causes beyond their control, and but little within that of their medical and other attendants, tend to make them temporarily better or worse. Many are doomed from the first, while a majority is destined to recover, or to undergo improvement; but time is required in all cases to establish the outcome, and there will be exacerbations and remissions, of various degrees, during the intervening period.

Many vulgar superstitions are held regarding insanity, and one that comes down from the days of witchcraft is that the moon's phases regulate the explosions of insanity. The word "lunatic" is derived from this belief in lunar control. As Spencer points out, many popular errors are due to imperfect observation, and

more accurate observation, which constitutes science, dispels such delusions, at least from among the better informed. The idea that the moon had anything to do with lunacy probably arose from the fact that light of any kind shining into an insane patient's bedroom frequently caused restlessness or fury. Dropping the curtain to a room into which the moon shines, or extinguishing the light in the room, would suffice in many cases to quiet the disturbed patient.

The insane are probably more affected by changes in the weather than are healthy persons. For that matter few escape meteorological sway of feeling, whether sane or insane. There are periods of unaccountable depression and exuberance of joy with all of us. Little ills may seem magnified into terrible evils, and we are "blue" without exactly knowing why; but such fits are apt to be upon muggy, stormy days, when the barometer pressure is low and there is less electricity in the air. Even chickens are droopy, and other animals show restlessness; horses look dejected, cows low; dogs and cats are sulky and snappish. Teachers, jailers, and asylum officials observe, among their charges, restlessness and ill temper; in hospitals the sick complain more, and it is to be expected that in asylums the mentally deranged will find in such conditions aggravation of their unstable, nervous states, so responsive to little adversities. Business men are not inclined to make ventures at such times, nor even to trust their own judgment, which they feel may be awry on account of the weather. Eloquent sermons fall flat upon congregations under such depression, and everywhere animation is toned down. The passing of the storm, restoration of the sunshine and the electrical tension, raise the spirits of all; more activity is seen in business circles, and the reaction may lead to some hysterical joyousness, as seemingly unwarranted as was the previous depression.

Prolonged high temperature increases the death rate in cities, and equable conditions of weather and temperature are best for sufferers from nervous disorders, but with the greatly lowered vitality of the insane they find more comfort upon days and nights that are to the healthy unendurable, and suffocatingly hot. They have been known to close windows upon such nights to secure more warmth. Many insane, however, are apparently

unconscious of mere heat and cold, and safely undergo exposures that would kill a person in good health. But head-injury cases may suffer headaches, and others among the insane may prove exceptions to the rule. Quiet, routine, rest, and absence of confusion are essential to the care of the insane, and when these can be secured the chances of recovery are increased.

Excitement is not peculiar to mania alone, nor even to maniacal states, for the melancholiac may be agitated, and during the period of *raptus melancholicus* exhibit extreme fury. Usually the maniacal excitement is aggressive or offensive, while the turbulence of the melancholiac is defensive, and is prompted by terror. Some lunatics, such as those with chronic mania, may be constantly "disturbed;" screaming, destroying everything it is possible to destroy, smashing windows and furniture, bedaubing themselves and their surroundings with filth, while others may be demonstrative at long or short intervals. Occasionally a hitherto very quiet patient may vary the monotony of his life by a fiendish outbreak, all the more dangerous because unlooked for. Some appear to wait for an opportunity to wreak vengeance upon the objects of their hatred. While spontaneous and unpremeditated attacks upon others are frequent enough among the insane, the presence of anyone who is disliked often increases the hostility; and those who have been friendly or kind to patients have the greater influence for good, and often have a calming effect.

The manner in which many insane respond to impressions may be styled qualitative and quantitative. For instance, attempted kindnesses may be resented because they are misinterpreted, and the quality of such contacts with the world may not be appreciated properly, while, on the other hand, a large number of the insane understand, all too keenly, the intentions of others towards them, and merely react quantitatively, by being either too promptly or less readily influenced. A chronic maniac with periodical exacerbations was roused to great fury by the taunts and harshness of attendants at the county asylum, but instantly upon the appearance of one who had been uniformly kind a visible effort to acquire self-control was made, and evident shame at being seen in so disturbed a state caused the maniac to hide away.

The noisiness of asylums rises and falls. Sunday is a quiet

day, if visitors are few; and it is inhuman to permit troops of curiosity seekers to irritate patients. Among a thousand patients not more than a dozen may at one time be difficult to manage, and there are pleasant days when scarcely any disturbance is made; but here and there one will scream or shout, and another will laugh boisterously. Some deliver vociferous harangues, and others sing; a few chatter nonsense or indulge in clownish contortions. One maniac at the county asylum whistled on an average ten hours a day, which left him little time to do anything else. Clouston tells of a patient in Edinburgh who was occupied in gardening, and who acted intelligently, and showed insanity in no other way than in talking gibberish. Not an intelligent word could the man utter, yet he showed by his acts that he was sane in all things but speech. His affliction was a sort of maniacal perversion of the speech faculty.

Max Müller, the philologist, claims that thought is impossible apart from speech, but he is not sustained in this view by biologists, physiologists, or alienists. The fact that the deaf and dumb are not necessarily unintelligent disproves his theory at once. But there is close relationship between intellect and the faculty of speech. Certainly the proper use of language depends upon mental integrity, but linguistic ability may undergo change or loss independent of the condition of the mind. A young lady suffering with right-side hemi-chorea became mentally confused when she attempted to speak, and could think clearly only when silent. Probably the erratic working of her vocal organs distracted her attention from what she intended to say. A degenerate with insanity of double form would begin speaking correctly enough, and answer questions properly, and then launch into a jabber of meaningless words characteristic of some hopeless cases; again speaking clearly, temporarily, when rested, and repeating the gibberish when tired.

Speech disturbances may arise in connection with, or apart from, insanity, and be due to derangements of the vocal apparatus, of the nervous control of such mechanism, of the brain center of speech, or of the intellectual use of language.

Various speech defects enumerated under organic brain disease may or may not be associated with other impairment of the intellect. Stammering or stuttering is not due usually to mind

implication; but the hesitating drawl of the paretic, and especially the "coprolalia," or impulse to ejaculate filthy words, certainly indicate, at least, will paralysis, as much as would other similar excitation of speech independent of mental control.

Motor excitement may be worked off in various ways; one may prefer to walk incessantly, another to vociferate; and the excessive garrulity of some maniacs has been lessened by diverting occupation.

At intervals an unanticipated outbreak occurs in an asylum, resembling the "running amuck" of the Orientals. Epileptics, periodical cases, paretics, traumatics, alcoholics, and others, may surprise the asylum by such an exhibition of maniacal fury.

Epileptics, during the interval of these attacks, may combine to escape, and the attempt may cause an epileptic fury, more or less general, among them. They may induce other insane, such as paranoiacs and paretics, to join with them; but the greater number of patients cannot sustain concerted action, and are more liable to assist attendants, probably to curry favor with the party in power, or, what is still more likely, the other patients will be indifferent to what is going on. This indisposition of patients to interfere is relied upon to enable a few attendants to control a large number of insane. Isolated cases may need a dozen persons to manage them for awhile; but ordinarily one attendant can control from forty to a hundred patients, according to the character of their mental disorders.

Ecstatic excitement is rare, but may be found among the so-called "religious insane," or the stagy behavior of katatoniacs may be miscalled ecstacy. Some of these katatoniacs, as well as paranoiacs or paretics, may lie in wait for victims, watching near a door, with uplifted arm ready to assault the first one who enters.

Some insane can be diverted from intended attacks, while others are not to be beguiled. A paretic or melancholiac can usually be drawn away from a harmful beginning; but maniacs, paranoiacs, and some others, laugh at, and see through, any method of defense.

It is necessary to recollect that in simple mania the intellect and the senses are in a state of exaltation, and the mental activities may be greater than ever. Tumultuousness of thought

is not indicated in all cases by incoherence, for the thoughts may be merely too rapid for expression. It would be a great mistake to treat a maniac as though he were a fool, for he will remember, and may act according as he has fared at the hands of others.

Maniacs, and the majority of other acute cases, usually recognize acquaintances, though they are liable to mistake persons; but where grievances, real or imaginary, are to be redressed, it is seldom safe to rely upon failure of recognition. Many insane hold enmities for years, and upon a favorable occasion may show that they have been awaiting their opportunity for revenge. The insane often have their likes and dislikes, and are moved to anger and joy, and entertain other emotions rationally, as well as irrationally. Because an insane person is amenable to some sane influences it does not constitute him "partially insane." Resentment and gratitude are noticeable traits among all but those whose minds are wholly destroyed.

Criminal propensities can be more conveniently regarded in other chapters of this book.

Excitement may even be a favorable indication, within limits, if it occur as a rebound from a previously depressed state.

The hopefulness of phthisis may tinge insanity, with which it is complicated; happiness characterizes both the quiet and the active paretic dements. Though the gaiety of the maniac is unstable, his alliterative and rhyming recitations may be prolonged indications of the joy he experiences. Irritability is found oftener among traumatic and alcoholic patients.

Mania and paretic dementia often attract attention to the character change by the sudden perversity of disposition, which is all too often attributed to alcoholic indulgence, when this has been merely induced by insanity. The moral degeneracy of insanity causes low company to be sought and excesses to be committed, the bare thought of which would have been intolerable to the sufferer previous to the insanity. Reckless squandering, and actual throwing away of money to strangers on the streets, occur in mania and paretic dementia, especially with an alcoholic complication. There appears to be a morbid impulse among some to divest themselves of everything of value, as though possession of anything in the way of jewelry or money was disagreeable to them. Money may

be borrowed or things stolen by such lunatics, for the pleasure experienced in throwing or giving them away, or to furnish means for riotous living.

Spendthrift excitement accompanies several forms of insanity among the younger patients, while in age the natural parsimony may develop into extreme miserliness, or even an inclination to do without necessities rather than part with money, though it may be owned in superabundance. Excitement may at the latter period of life also take the form of loquacity or garrulity, which when the patient is alone becomes soliloquizing. In the younger insane, particularly in hebephrenia, wandering about aimlessly is the manifestation of the restless disposition.

Alienated affections are among the first symptoms of many mental diseases, especially in puerperal insanity, alcoholic insane states, and paretic dementia, and to a lesser degree in melancholia.

Increased sexual desire accompanies many different insanities, and may lead to criminal or immoral acts, or be more or less concealed. Self-abuse is one of the debilitating causes of some insanities, particularly just before puberty, but the practice is one of the most common with the majority of the insane of both sexes, and is oftener the result than the cause of insanity.

"Borderland cases" are those in which the troublesomeness of the patients is sufficient to cause great annoyance and apprehension at their homes, while the insanity does not appear to be of such a nature as to justify removal to an asylum. Many patients of this and the recurring kind, or who are otherwise in possession of intellect enough to impose upon others, give great annoyance by seeking habeas corpus releases. It may be laid down as a rule that the more frequently habeas corpus proceedings have been started by a patient the more likely he is to be a dangerous person to be abroad. The circular insane and paranoiacs are prominent in this class.

A disposition to persecute and prosecute others, and to become court-room nuisances, characterizes some degenerates.

The emotional excitement may take the form of intense egotism or pride, as among the megalomaniacs of degeneracy. Selfishness is often exaggerated brutally in insanity, though generosity may persist as a relic of former soundness of mind, or even be insanely exaggerated.

Depression serves as another term under which may be gathered the less obtrusive states of insanity, from the profound lack of energy of stupor, and the "thunderstruck" terror of melancholia attonita, to slight listlessness of mere mental enfeeblement.

Melancholia and hypochondria are not always of the quiet order, for the former particularly may be agitated enough to be mistaken for mania. Many of the phobias and indecision states are associated with depression.

Delusions as to persecution, as well as many other insane states, may be manifested by anxiety, shame, remorsefulness, grief, sorrow, suspiciousness, obstinacy, jealousy, apprehension, timidity, reticence, or absolute mutism.

Nostalgia is the particular affliction of people who come from mountainous countries, such as the Scandinavians and Swiss. The simple depression of homesickness is frequently fatal, and a return to home will promptly restore cheerfulness and health.

Depression may be a sign of recovery from mania. But the depression of vitality which leads to the indifference, seclusion, and untidiness of the dement is of a more negative character than that which prompts the melancholiac, or other patient, to refuse food. Ideas of unworthiness or suspicion of poison, with or without a desire to commit suicide, instigate refusal of food, or there may be a physical repulsion to food independent of all these causes.

Insane actions, other than those mentioned above, due to enfeeblement or perverted volition, memory, or general intellectual degradation, are too numerous to detail fully, but a few principal peculiarities of the kind can be noted. Some of the most important are such as arise from the exertion of undue influence upon the insane, to be regarded later in connection with other medico-legal matters. The disposition to imitate in some of the insane originates an occasional instance of communicated insanity and adopted delusions. *Folie à deux* thus arises.

Somnambulism and other irresponsible sleep states, as the *Schlaftrunkenheit*, in all of which crime may be committed and no recollection thereof be preserved by the culprit, are insane acts.

Malicious mischief, or its semblance, is common with imbeciles, hebephreniacs, the hysterical insane, and occasionally other kinds of patients. False accusations and confessions are most likely to occur in hysteria or at puberty.

Improper marriages are characteristic of alcoholics and, to a lesser degree, numerous other kinds of insane.

Indecencies in public occasion arrests of persons and lead to the first recognition of their insanity.

Disappearances are often the result of insanity appearing suddenly, or the consequence of mental diseases, though foul play, suicide, and undetermined causes also co-operate in mysterious absences.

People have wandered away from home after head injuries, during alcoholic or epileptic attacks, or while suffering from senile dementia, transitory frenzy, mania, paretic dementia, and, particularly, hebephrenia. Such are most liable to be found again, or come to grief in some way through accident. Melancholiacs furnish the most numerous disappearances due to suicide, though other insane are also suicidal. Among cases of disappearances subsequently accounted for are many due to murders in various ways and from all imaginable motives. Both the sane and insane have enlisted in the army or navy, or simply abandoned home from various reasons sufficient or insufficient; in many instances the circumstances point to probable mental impairment as the main cause.

The possibility of epileptic double consciousness enabling anyone to lead two separate existences for long periods, during one of which no remembrance of the former life may be preserved, rests upon good authority. Dr. S. Weir Mitchell, of Philadelphia, is referred to for some striking examples. The passing from one state of consciousness to the other would entail abandonment of the late home, often resulting in great suffering to others.

Of course accidental death, by falling from a ferry-boat, or bridge, or similar causes, occurs to perfectly sane persons, and their bodies may never be identified or found.

A Nebraska judge abandoned his home suddenly and was discovered working in an Iowa lumber camp, long afterwards, as a common laborer. Whether this was owing to insanity or not has not been clearly made out; but an Omaha physician claims that after an operation which restored his eyesight he grew utterly indifferent to all his former friends and relatives, and, though otherwise appearing to be sane, he sympatized with the judge who had left his home apparently from the same mental causes that

had been followed in the physician's case by antipathetic feeling towards his former surroundings. In both cases overwork was stated as having preceded the ill-health and change of disposition.

A printer abandoned his wife and child and was found dead in a freight car a thousand miles from his home. He had suffered since a child with suppurative inflammation of the middle ear. A politician whose accounts were found to be extremely confused disappeared, and returned after a few months' absence, claiming to have no recollection of events during his absence. Insanity might have been inferred from the likelihood that a sane politician would have been more likely to stay and brazen matters out, or otherwise "fix" his accounts.

A hard-working and hard-drinking author of a great commercial cyclopædia frequently disappeared from his office and turned up in hospitals, but finally was lost sight of altogether.

Abductions or accidental death would account for the sudden vanishing of little children. Country girls are too often abducted or enticed into immoral lives, and imbecile females are quite liable to be induced to become abandoned, and to forsake their homes.

Consciousness is involved in insanity, from alteration or impairment to its complete extinction. There are no certain tests, either in medicine or law, as to consciously performed acts. Each case must be decided by itself. Automatic acts may be performed while unconscious, and many of these are extremely complex. An epileptic can, while absolutely unconscious, do many apparently intelligent things, some of them requiring discernment, ingenuity, secretiveness, tact as well as strength, and a boldness that may be foreign to his character when sane.

The trance performances of alcoholics may, even to a greater degree, be consistent with an apparent exercise of judgment, reason, and, in short, every faculty and sense but that of consciousness.

Somnambulists have been classed as the speaking, the acting, the speaking and acting, the hearing, speaking, and acting, the seeing, speaking, and acting, and the hearing, seeing, speaking, and acting. Westphal and Siemens' enter fully into the forensic import of these sleeping attacks, and the former refers to the case

[1] Archiv. fur Psychiatric, VIII., 200, IX., 72.

of Von Zastrow.[1] The relationship of epilepsy to these sleeping disorders is considered by all modern authors on such subjects.

What is called mind and word blindness and deafness are states of obliteration of consciousness exercised in the recalling of words which have been learned through optic or aural sources, caused by suppression of the psychic registration of such impressions. Double or alternating consciousness, also akin to epileptic alterations of the brain function in that regard, consists of changes in conscious states, as though different levels of consciousness could exist alternately. Absence of mind is a healthy process, and may indicate a high order of reasoning ability, and the power of intense concentration; but the empty abstractions of paretic dementia are by no means of this nature. While Isaac Newton, who was subject to healthy abstraction, could benefit the world by telling, afterwards, of what he had been thinking, the paretic has been wholly unconscious, and cannot truthfully state that there was anything in his mind at the time he appeared to be plunged into profound thought.

Change of sense of identity, and even total forgetfulness of one's own name and antecedents, are perverted states of consciousness, observed occasionally in the course of many mental diseases.

Confusion and incoherence of thought, ideation, reason, intellect, imagination, or judgment, may not be indicated by mere speech incoherence, which is another matter, although the mental confusion is apt to lead to incoherent speech. The mind may be confused while the patient is silent, or silliness of speech may sometimes exist with clearness of intellect, but of course mental and speech incoherence are often associated. In mania the mental processes may be abnormally clear, but their rapidity is too great, at times, for expression; and sentences are unfinished because speech is too slow to express what is passing in the mind; but it must not be inferred from this that in mania the mind is always free from confusion, for in this, as well as in other insanities, it is, at times, completely obscured, and at such times the maniacal speech and reasoning are both incoherent.

In epilepsy, speech may be automatic, regular, coherent, and

[1] 1 Casper and Liman, Medical Jurisprudence, 509.

apparently intelligent, and the mind may be a blank, so far as we are able to determine; so that even coherent speech is possible in the absence of consciousness.

Memory derangements may be partial or total, temporary or progressive, according to the removability of the cause.

Under organic brain disease some of the more serious and inconvenient memory aberrations are mentioned, as the inability to remember written or spoken words, or gestures, or even the uses or names of common articles. Amnesia is the generic term for memory loss, and the various kinds of amnesia require fuller consideration in the chapters on Testamentary Capacity and Destructive Brain Disease.

Any disease of the brain may affect the memory, and coincidental with mental weakness there may be memory weakness. Memory is an inseparable part of the intellect. Temporary anæmia, or malnutrition, may weaken the memory, and ordinary recollection varies with fatigue or freshness. The ability to commit things to memory is great or less, according to the health at the time; when the circulation is active memory is often at its best. Even feverishness may increase the memory temporarily and fitfully.

In maniacal states the memory may be prodigious, and in simple mania, particularly, it is often abnormally developed, at least in the early stages; and in some maniacs this memory exaltation may persist throughout the disorder. Upon recovery from mania it is found that everything is fairly well recollected, though here and there hallucinations may intrude themselves into recollection, and the patient will be uncertain or positive of the reality of such impressions, according to his native intelligence or ignorance.

The popular notion that memory loss is common in insanity is quite erroneous. Melancholiacs, among others, are apt to feel humiliated by the recollection of what has transpired, and deny recollection, when they remember very well.

During some of the delusive or furious periods of mania, melancholia, hysteria, puerperal fevers, epilepsy, and paretic dementia, the memory is usually seriously impaired, but many chronic insane have very good and useful memories; acts intelligently performed are not alone enough to show whether memory is pres-

ent or not. Defects of moral sense are occasionally associated with memory debasement. Some imbeciles through their inability to understand the nature of an act commit indecencies; or when disease deprives one of knowledge the moral sense may suffer without responsibility.

The fading away of memory in old age or during general debility causes, first, loss of recollection of proper nouns, and next of some common nouns. Recent events do not impress the weakened memory, but events long past are usually distinctly recalled, while matters that have just occurred may be readily forgotten, regardless of their importance.

This suggests that it is a very unfair method of testing the memory, when its impairment is in question, to show that far-off things are recalled. The dotard who cannot remember whether he has just eaten, or does not recognize his own apartments, may accurately recollect his early life.

Memory gaps, or lacunæ, occur in several insanities, or sometimes in head-injury cases without very obvious insanity. Entire periods of life may be obliterated from recollection, and brain compression has after recovery left years of existence unrecalled. Ray[1] cites the case of Welshmen, in Philadelphia, who spoke their native tongue during severe illness, while the English that they had spoken since their childhood was forgotten. Descent into deep mines or caissons of bridges has resulted in the temporary loss of recollection of acquired languages. When recovery from gaps in memory takes place, the oldest matters are first reinstated, and gradually the past is recalled, from the more remote to the more recent, until the last things that have been forgotten are also restored to the mind.

In senile dementia the impairment of memory of recent events is extreme, and the mind in general is not only enfeebled, but it is deranged. In terminal dementia of the decided type, the entire mentality, including memory, is both weak and fickle; there is neither coherence nor cohesion. Things make little, if any, impression, and are soon forgotten.

What the Germans call *Summarische Errinnerung* is the impaired memory of some insane and drunkards as to what may

[1] Op. cit. 306.

have taken place at periods they find difficult to remember. Only a faint, sketch-like, very spotted, recollection of matters, here and there, is preserved.

Defective attention frequently induces one to suppose that the memory is at fault when it has only been insufficiently exerted.

Close attention is at the root of powerful memory, and the trustworthiness of memory is according to the power of attention. Inattention leaves little in the mind to be recalled. Often after an injury that results in suffering and in hypochondriacal states, the patient may be so absorbed in his miseries as to be impressed but slightly by other affairs, whereupon, finding that he recollects imperfectly, he adds to his other apprehensions the fear that he is losing his mind.

False memory, or paramnesia, characterizes healthy as well as diseased mental states. The delusions, hallucinations, and illusions of the insane may tincture and falsify their recollections after recovery, as well as before; but the pranks and uncertainty of human memory are so well known to lawyers that they are notoriously poor witnesses, because they frequently interpolate, while testifying: "If my memory is correct;" "to the best of my knowledge," etc.

Normally recollections are localized by some important or impressive event, as "before or after the war," "before or after marriage," "before a certain journey," and so on. Women date matters from the birth of children, and, similarly, association assists in determining when a certain thing may have taken place.

We are also more likely to be guided in what we recollect by the utility or interest of the moment of occurrence, and things are also perceived according to personal bias and prejudice. Moreover, recollections change from day to day, and the last remembrance, instead of the original impression, is more likely to be recalled; and for this reason the liar finally comes to believe his own falsifications.

Prolonged trials, such as that of the Bell telephone patent contests, reveal the fact that very often positiveness of recollection increases with the remoteness of the events. Witnesses who in the earlier periods of the contest were very dubious about certain matters were found several years later to have grown quite assured of what before they stated timidly.

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Efforts at recollection enable one to fill gaps, but, unfortunately, imagination is also too frequently at work to assist in this. A sketch may consist only of a few unconnected outlines, and yet may suffice to suggest to the mind a picture in detail, and later you may fancy that the details had been filled in by the artist. Processes of inference abridge the work of recollection, and too often the inference is taken for the recollection, and there may be a marvelous memory of what has never happened, with astonishing vividness of details.

Children often accept as true, without question, ideas that come into their minds, especially when their notions are approved by older persons. The abnormal imagination of the average child is too little allowed for when upon the witness stand. Sincerity and apparent accuracy make his testimony so impressive.

Among adults strong prejudices and weak judgment are most apt to be associated with false memory. Then there is the occasional ability to lie, with the desire to appear omniscient. Some experts have been trapped into recollecting authors and their writings by an attorney who subsequently showed that he had invented both the name of the author and the article cited. As Victor Hugo states, "There are always people who have seen everything." There are persons who have no ability to distinguish between the fact and fictions that have been confidently communicated to them. Dreams may occasionally obtrude themselves into recollection, and with difficulty be recognized as such. Illusions of memory are frequent among the insane, the aged, and children.

What has been called "double memory" consists in a provoking feeling that a certain event that has just happened, has also been previously experienced by the same person. Inattention accounts for most of such instances; the first impression being faint because of lack of sufficient observation, and the second being more complete, with failure to recall the time and place of the first impression made.

Some insane insist that everything that has happened has previously occurred in their recollection; and in some cases they insist that all that they experience has been foretold to them.

Delusions are faulty ideas arising from imperfect inferences,

and, as no human being is free from mistakes, delusions are the commonest things in life. Spitzka defines delusions of the insane as "faulty ideas growing out of a perversion or weakening of the logical apparatus." Then, where the logic has never been very good, delusions may abound, though the deluded person may be considered sane.

Entire nations have not only entertained delusions but acted upon them. Thus, in 1212, under the boys Stephen and Nicholas, 50,000 children were sent in ships to capture the Holy Land, on the delusion that innocence of the crusaders would alone secure victory. The greater part of this helpless army perished miserably by sea and land, and many of the survivors were enslaved by their captors. Party prejudice and religious zeal create delusions that enable demagogues and bigots to make tools of the people. The world's history, and, for that matter, the history of every individual, is replete with the entertainment of delusions.

The existence of delusion, in spite of its universality, has occasionally been made a test of insanity, when the only possible distinction that can be made between a sane and an insane delusion is that one is held by a sane and the other by an insane person.

One religious sect insists that the other is deluded; nor is the character of the act induced by the delusion any guide to the determination of sanity, for, while under insane inspiration, a parent may sacrifice his child on an altar. Human sacrifices were common in past ages, and are still practised in some "unenlightened" countries. Enlightenment is a relative matter, and is no criterion of what should constitute insane delusion, for the next-door neighbor of the most learned may be deterred from some fiendish religious practice only by fear of the prejudices of others, which in turn he looks upon as unreasonable.

Prichard,[1] in 1837, gave reasons which have never been controverted why delusion cannot be a proper test of insanity, and predicted that the time would come when insanity could be demonstrated in some cases as free from delusion. We now know that in imbecility and other mental derangements there need be no delusion, and that in stuporous insanity, confu-

[1] On Insanity, 16, 272.

sional insanity, transitory frenzy, and epileptic insanity delusions are undemonstrable, because consciousness is absent; and to claim that delusions may exist in the absence of consciousness is equivalent to admitting the possibility of any other undemonstrable thing, such as that of "Jack and the Bean Stalk" stories.

The contents of delusions of the insane are numberless, and are not of so much importance as their classification. Spitzka's separation of delusions into systematized and unsystematized, is an important one. The systematized delusion, one that is logically arranged, explained, and defended, occurs in but two forms of insanity: paranoia and hysterical insanity. Reasons can be given by such deluded patients for all their affirmations relating to the delusion. The unsystematized is the common delusion of other insane.

Delusions can also be divided into the expansive and the depressive, and into the fixed and the variable, according to their duration. Both the systematized and unsystematized delusions may be held by an insane person for a longer or shorter period. A delusion that can be skillfully argued about (the systematized one) can be fixed or exchanged for others of the same class, and systematized variable delusions may be each in turn maintained; but the rule is that such ideas are long-lived, and therefore fixed. The unsystematized notions of the insane may be fixed, or exist for quite a while, as, when a maniac harps, for a week or so, upon one subject. This fixation for the time does not constitute the delusion a systematized one, for no attempt to explain why this one subject is uppermost is made by the insane mind, and therefore this fixed delusion is unsystematized. The delusions of delirious states are rapidly variable, as they are in several other forms of mental derangement.

A genuine delusion, or one that is the direct result of the insanity, differs from the spurious delusion, which has been adopted from another insane person. The imitative tendencies of the insane, and the effect of mental contagion, are noticeable in such communications of delusions as occur in *folie à deux*. The insanity of twins, however, appears to be merely the operation of like causes producing like effects which sometimes amount to almost identical delusions, even when the two are separated.

Mere absurdity of a delusion is no test of any kind of insanity,

for an apparently logical process may result in an absurd conclusion, while poor reasoning may arrive at a more sensible deduction, in both sanity and insanity.

The health has often much to do with the nature of a delusion, as expansive or depressive. Sickliness sometimes induces the latter, though not always.

Among expansive delusions are those of mania and paretic dementia, based upon the feeling of being well, and insanely interpretated as magnificence, great strength, towering height, vast wealth, etc. The hypochondriac and melancholiac suffer from depressive delusions relating to their bodily parts,—as, that they are absent,—to sinfulness, unworthiness; and the persecutory delusions of the paranoiac, alcoholic, and others refer to enemies and their plots.

A fixed idea that one has lost every friend is an incipient form of depressive delusion, common to several insanities.

Further subdivision of delusions can be made into the religious, erotic, ambitious, political, grand, persecutory, suspicious; and into those relating to poisons, unworthiness, having committed the unpardonable sin, and to the effect that the patient is not fit to live, that conspiracies or plots exist, etc.

Delusions concerning identity take the form of a belief that the old self has been replaced by a new one. Hack Tuke tells of a patient who hunted under the bed for his lost self. The old and the new self may alternate, or both may coexist in the insane imagination, and the patient will assert that he is two persons.

Hypochondriacal delusions sometimes relate to a change of sex, or induce the belief that parts of the body are made of iron, putty, or glass; that the bowels are gone, the head is off, or it is too big to pass through a door. Some victims are restrained from moving for fear their great strength will cause the house to fall; others claim that the penis is 15 miles long, etc.

The arrant nonsense that some paranoiacs can gravely believe regarding their importance is astonishing. One will think that all the preachers in the world aim their sermons at him, or that most personal advertisements refer to him; and others may think that the hostility or favorable interest of kings, millionaires, or beautiful or noted women attends them, that they are the "chosen of God," and that the earth and all nature watches them.

Definite or indefinite persecutory delusions may either of them prompt acts dangerous to others; for the exceedingly common suspicious or persecutory delusion, and the belief that injury is intended or done to them may lead the definitely deluded one to retaliate upon the fancied source of his ill treatment.

Delusions of ill treatment by a class of persons induces the singling out of some one of that class; for example, if soldiers are the supposed persecutors, then an officer may be attacked by the insane person. In the political delusion of persecution some official, or even the head of government, may be slain. When the belief is that lawyers have conspired against the lunatic, a judge may be shot at.

Occult influences, such as electricity, telephones, telegraphs, magnetism, hypnotism, when insanely assigned as causes of persecution, lead to the search for the one who is responsible for them; or something desperate may be accomplished "to draw attention to his case, in the hope of redress;" or such unfortunates may be raised to a blind fury against everyone.

Previous religious prejudice, which is often so strong with the sane, may be reversed, and the priest, who was formerly reverenced, may be attacked by the insane as the originator of his troubles.

The accusations of the insane against themselves and others should not be accepted carelessly as being grounded in fact, as has too often been done. Nor should it be considered disproof of insanity that facts are the groundwork of the insane complaints, for the delusion may consist in facts being contemplated by a diseased imagination.

No classification of insanity can be based upon the character of delusions, for one form of insanity may entertain several kinds of delusions, and many insanities may share in common one sort of delusion.

Hallucinations are baseless perceptions that may involve the senses of sight, hearing, smell, taste, and touch. The appearance of the sun at midnight would be an hallucination of sight; hearing the voice of a dead friend is an auditory hallucination; a feeling as of being pricked by multitudes of needles is a tactile hallucination. Similarly, the taste and smell may be hallucinated.

Illusions are misinterpreted sensations, and, similarly with hal-

lucinations, may engage any of the senses. If everything one eats tastes like butter, or all that is smelled appears to be decayed; if the ticking of a clock sounds like spoken words; and a stranger is mistaken for a friend,—illusions have occurred.

Both hallucinations and illusions are compatible with sanity, for erroneous or misinterpreted sensations may be experienced by anyone. When such false impressions are believed to be true ones, then a delusion is the outcome; or a delusion may precede and appear to originate an hallucination.

Hallucinations and illusions are nothing but morbidly intense memories. What we experience through the senses is recognized by a certain vividness of impression, and in the exercise of memory these registered sensations are repeated in a fainter manner. In recalling a scene, for example, a faint mental picture is usually represented by the visual memory; and in thinking of words that have been spoken a similarly faint mental reproduction of the sounds constitutes the activity of the auditory memory. If, however, instead of a faint reproduction there are startlingly strong ones, the recollections that were practically inaudible and unseen become whispers or shouts, and images appear with life-like definition. The hallucinated person may deny that the apparition or false voices are anything with which he was previously familiar, but for that matter ordinary thought may take unaccountably grotesque directions, in any mind. "There is nothing in the intellect that has not reached it through the senses," is a saying as old as Descartes, and as true as other demonstrated physiological facts; therefore hallucinations and illusions are merely morbidly vivid memory reproductions, no matter how distorted such memories may appear to be.

Tinnitus aurium, or ringing, whistling, and similar noises in the ear, are instances of auditory illusions, often due to external or internal ear disease, or to faulty circulation. A blowing noise synchronous with the pulse is caused by an aneurism of some blood vessel in the brain. But if such false sounds become defined into music or voices the brain substance itself is the seat of the disorder. Such noises may be hardly discernible whispers, or may be surprisingly loud. They may afflict only one side of the head, seeming to be spoken into one ear. Often the voices, instead of appearing to proceed from the external world,

are recognized as originating within the person; from the chest or abdomen, or from particular parts of the head. The hallucinations are often located back of and above the left ear, in the brain, or in other brain parts. The expression of such hallucinated person is peculiar, his eyes are often fixed as though trying to concentrate his listening, and he may laugh at or answer the voices he hears. Musicians are more apt to hear music, and artists to see landscapes or images, the microscopist to have hallucinations of desmids, diatoms, or histological tissues; exactly as dreams are compounded of more or less coherent experiences of the dreamer. The voices may be friendly, annoying, or even threatening; one side may seem to hear one kind of communications and the other side a different sort, amounting to conversational contests, in some hallucinated persons, between a friendly and a hostile influence.

The danger of auditory hallucinations arises from their liability to become mandatory, as when commands are heard to kill others, or to commit suicide.

An alcoholic may hear the foulest imprecations of himself, or by day and night the advice to destroy his wife, finally rising to an unceasing din of repetitions of "Kill her! kill her! kill her!" Such distressing hallucinations have coexisted with otherwise apparent sanity for long periods, though it is readily seen how a mind could break down under such a strain.

An intelligent merchant described his sight hallucinations (occasioned by the effect of a head injury when a child) as consisting in the most realistic appearances of persons who were thousands of miles away, or long since dead. He stated that the minutest details of feature and dress were to be seen in such apparitions, and that he distinguished their unreality only through reasoning. Gradually the images grew less distinct, and finally failed to appear.

The time and country in which the hallucinated person lives will determine much of the character, and afford an explanation of the appearances or voices. Formerly witchcraft ran riot as an assigned cause or subject of the false perceptions; electricity is the favorite explanation by the ignorant of our time.

Epileptic attacks are sometimes heralded by auditory or visual impressions of the kind; one sufferer always saw a little old

woman in a red cloak, another a battle scene; a young man, before his spasms of *petit* or *grand mal*, had a vivid mental representation of a village Sunday, with his friends going to church.

S. Weir Mitchell[1] mentioned the frequency of hallucinatory troubles of amputation patients.

Hallucinations of sight are common for a long while after recovery from puerperal convulsions, unreal personages, sometimes hostile, distress the waking vision. Lice, bugs, and flies, are persistent among others, and the hallucinations of delirium tremens are notorious.

The melancholiac misinterprets the anxious watching of friends into unfriendly demonstrations, and the frequent mistakes of identity by the mentally afflicted are common instances of insane illusions.

The phenomena of refraction and perspective abound in illusions for everyone. The mirage is an illusion familiar to travelers. Lovers see beauty where it does not exist.

Physical conditions attending insanity may be merely coincident, or such as are frequently associated with states of mental disease; and in a minority of cases there may be physical symptoms of insanity.

The attitude at times is a consequence of brain irritation or alteration, as when constrained positions are maintained. The arms, hands, feet, legs, head, or facial muscles may be contorted, according to the portion of the cerebrum or spinal cord influenced. Awkward positions of all kinds are noticeable among the chronic cases. The advanced terminal dements usually sit upon the floor with bowed bodies and with the coat or dress drawn over the head. The strut of pride, timidity of melancholia, complacency of paretic dementia, furtive watchfulness of paranoia, fatuity of imbecility, restlessness of mania, and the total lack of energy in stuporous states, can be distinguished as characterizing the appearance and movements of the insane.

There are occasionally paralyzed or partially paralyzed cases among those whose brains are structurally faulty; there may be deformities such as "hump backed" individuals from spinal curvature; usually carious spines from tuberculosis. An arm or leg

[1] Injuries of Nerves, 352.

may have failed to develop, and among degenerates the so-called stigmata are observable in want of symmetry of the head, protruding lower jaw, prow-shaped forehead, etc.

Imperfect gaits may be due to faulty co-ordination associated with brain disease; the ataxic stagger of paretic dementia being the most marked. Some patients refuse to move, or strike attitudes in obedience to uncontrollable impulses, as in katatonia, or through the suggestion of delusions. Automatic movements voluntarily or unconsciously performed, as the grimaces of "tic convulsif;" catalepsy, convulsions (hysterical, epileptic, or apoplectic); many sorts of tremors or tremulousness, spastic rigidities, and speech alterations, are observed in the asylum wards. The mechanical reflexes may be normally exaggerated, lessened, or absent, indicating bodily conditions unassociated with the mental. Some patients are mute either because they cannot or will not speak. A negro at the county asylum had been silent for ten years, but finally spoke to warn persons of impending danger. Aphasic derangements are occasionally found, and all degrees of coherency and incoherency of speech.

A majority of the chronic and a few of the acute insane sleep quite well, but the remainder are at least disturbed during the night, as shown by their mumblings, mutterings, and restlessness; while a few are absolutely sleepless for amazing periods. Cases of prolonged sleep are not numerous, except in very enfeebled conditions.

The furred tongue, associated with obstinate constipation and blotchy complexion, is common among depressed lunatics, especially melancholiacs. Diarrhœa is apt to afflict terminal dements, and it helps to carry them off.

The flushed faces of excited patients, the sallowness of epilepsy, and the pallor of the badly nourished, are seen here and there, and few escape the haggard, aged, furrowed, and wasted facial appearance, so common in insanity. Those who were good looking become as repulsive in appearance as the majority, and a return of comeliness often indicates approaching convalescence.

The insane odor is recognizable by anyone who has had the least experience with insanity. The altered secretions smell something like a mouse's nest, and must be due to more than a bad breath and untidiness, for the sick in hospitals are not

thus offensive, and ordinary filth affords no such characteristic smell. When jails, reformatories, and poor houses afford the odor, it may be reasonably inferred that insane persons have occupied such places. Sometimes no cleansing can rid a room of the odor until the patient has been removed, and after many days of ventilation.

The insane manner consists in oddities of behavior that attract attention to the patient, and is made up of physical signs with which the observant become familiar, covering a great range of activity or degrees of passivity, apparent to the student of the subject.

The insane appearance consists in the physiognomy of insanity, including the animated expression of maniacal states, the fatuity of the paretic and other dements, in their later stages; certain palsied expressions in organic brain diseases; the anxious look of melancholia; the corrugated brow of some delusional insanities; the look of insane terror, haughtiness, suspicion, or indifference. As everyone is an unconscious physiognomist, and reads the features of others without analysis, but more or less accurately, so facial expressions enable the student of insanity to recognize what can be summed up as "the insane appearance."

The insane ear is a noticeable malady among the trophic disturbances in asylums. Its appearance is regarded as unfavorable, though many instances of full recovery after double "hæmatoma auris" are recorded. It is a deformity of the ear, a puffiness or bloating of the auricle, such as boxers sometimes develop. It rarely occurs on the right side, and then usually only after the left ear has been previously affected. It is more common among the terminal dements than with others; and while it may be induced by injury, some perversion of the circulatory system predisposes to the deformity.

The circulation may be variable, between extreme rapidity and slowness, between tenseness and fulness; or the quantity indications may be lessened in the acute stages; and often, at all periods, there is an insufficiency of the circulation, shown by puffiness of members and blueness of the lips, hands, or other parts. Excitement in acute insanity accelerates the heart and pulse rate, but the wildest exhibition of the chronic insane is frequently attended by a perfectly calm and regular pulse. It would seem as though

the fury was purely mechanical in such cases, and that the vital processes had become independent of the emotions.

Sudden flushings suffuse the faces of some patients with irregularities of blood supply.

Heart diseases are probably more frequent among the insane, and fatty degeneration of that organ and the arteries is also common, creating a special type of insanity called the atheromatous, when the cerebral blood vessels are thus degenerated. Valvular troubles of the heart are still more frequent.

The respiration presents nothing special, beyond its corresponding with the general functional conditions.

Lack of nutrition and tendency to rapid emaciation characterize most acute attacks of insanity. In the apathetic and chronic forms the patient may become obese. It is an unfavorable sign to acquire flesh before mental restoration.

All sorts of organic and functional derangements of the digestive tract are abundant among the insane, from cancers to dyspepsia; and much of the indisposition to food is due to such troubles. The appetite may be at either extreme, from abhorrence of anything to eat or drink to ravenous gluttony.

The secretions are altered; the saliva may be excessive, thick, and turbid, and occasionally both saliva and tears may be scanty. The perspiration is sometimes superabundant and strongly odorous, or absent altogether, causing a dry skin. The hair usually loses its gloss, and becomes harsh and erect, sometimes falling out. The temperature is but little changed, as a rule, and is raised but slightly in excited states. A somewhat lower bodily heat attends most cases of insanity, due to defective circulation. In delirium grave and also during the "status epilepticus" there is often a very high temperature. Skin diseases of many kinds occur, and the bones often become very brittle, and hence are easily broken, especially in paretic dementia. The urine is scanty and heavy in melancholia and terminal dementia, and above the normal quantity in mania and paretic dementia.

Bed sores and sloughs are more liable among the bedridden cases than in general hospitals.

Asthmatic attacks occasionally alternate with insanity or its exacerbations.

Cachectic states, especially the tubercular, exist in a large per-

centage, and a large number of insane succumb to consumption; the lowered vitality, associated with mental impairment, affording but feeble resisting power against the tubercle bacillus.

Disturbances of sensibilities consist most often in a blunted touch sense. Anæsthesia and absence of pain sense are so extreme in some cases of paretic dementia that severe burning of the flesh may not be felt. Headaches are infrequent, except in syphilis, which also induces fleeting pains about the body and limbs.

Dizziness and roaring noises in the ears often afflict patients through faulty brain circulation, with fulness or a feeling of pressure, or an empty feeling originating the idea that the head is too large or that the brain is gone; the hearing may be deranged either through hallucinations or dullness. The eyesight undergoes no alteration characteristic of insanity although some oculists earn large fees by attempts to remedy trivial or imaginary ocular troubles with promises of cure of the insanity.

The pupils are often enlarged in melancholia as well as in many other forms of insanity, and this dilated condition may be generally regarded as indicating brain weakness or irritation. Inequality of pupils is found in most cases of paretic dementia. What is called the "arcus senilis" is a whitish rim around the cornea; and occasionally fatty degeneration of the heart or arteries is associated with this sign; but the rugæ, or ring like feeling, of the carotid and radial arteries are better indications of atheroma. Faulty eyesight due to atrophy or cataract has no special significance among the insane.

Over-enthusiastic gynæcologists have failed to establish uterine disorders as connected with insanity, except in a few instances where any sort of bodily complaint may aggravate or precipitate an impending attack.

The handwriting may by its tremulousness merely denote the nervous state of a patient. Thus, in mania, melancholia, and senility, the writing may be shaky; but the contents of the writing are of more importance in indicating the nature of the disorder. Some paretic dements write vast numbers of letters, usually setting forth their grandeur and gigantic schemes. They underscore, capitalize, and use exclamation points freely. Hypochondriacs detail their miseries at great length. Sometimes

maniacs write volumes of good, bad, or indifferent stuff, according to their ability or education. What the insane person writes may be clues as to delusions, and in a few instances may afford the sole means of determining whether the person is insane or not. Libelous letter writing may indicate the insanity of hysteria, the maniacal stages of the circular form, and paranoia. At the climacteric inordinate jealousy may prompt a wife to write scurrilously and anonymously to her husband. Abusive letters to, or concerning, asylum officials, are a very bulky part of the insane mail. There is nothing in the writing of the insane of a symptomatic nature beyond the fact that the writing of anyone is a "highly organized expression," as Savage calls it, and likely to suffer with nervous or mental derangement.

Menstruation, with its relation to insanity, is important because of the misconceptions extant on the subject. Normal menstruation may among vigorous females be attended with no noticeable derangement of the health or change in mentality; but occasionally women are more or less debilitated at the recurrence of menstruation; and debility, however induced, is often worthy of more regard than is the mere physiological process.

Tendencies to insanity are aggravated by such circulatory changes; nervous disorders are made worse, and craving for narcotics and stimulants are induced in some; even normal menstruation unsettles the mind of the unstable. Regular menses are of importance to some but not to all women. Those with a heredity taint are more likely to be influenced by menstrual irregularities, such as stoppage or excessive flow. For that matter hemorrhoids, or pruritus, may act as an exciting cause of insanity. The cessation of the flow is more often a symptom only; and it is the rule during mania, melancholia, and hysterical insanity, for the menses to be absent and to be restored upon recovery from the mental disorder. Patients who are regular are often more disturbed with each periodical return than those in whom the function is absent altogether; and though re-establishment of the flow accompanies a return of health, it also occurs when the patient is passing into terminal dementia. Degenerates are more likely to be influenced in their insanity by menstrual or seasonal recurrences than is the normal person. When at the climacteric

the menses cease altogether, marked mental changes for the better often take place, even to recovery from insanity, though this epoch may mentally disturb other women, usually temporarily. Excessive flow of menses may operate as any other hæmorrhage, and induce ordinary melancholia or mania, from which in most instances the patient rapidly recovers, with the correction of the inducing causes, affording one of the rare instances of pelvic trouble association with insanity. Painful menstruations have no greater connection with mental disorder than has menstruation in general.

CHAPTER V.

DIAGNOSIS.

Insanity, in most instances, is not determined off-hand; nor does it consist in the jumble of symptoms imagined by the uninformed. Precisely as sicknesses may be told apart from one another by their symptoms, such as the rash in scarlet fever, the pitting in smallpox, the cough in lung affections, the swelling in dropsy, so are the characteristics of mental disease separable into distinct peculiarities and groups of symptoms, that enable the educated and experienced to name the particular kind of insanity, and to estimate the probable results of the affliction.[1]

Visits have been made to insane asylums by inexperienced persons without discovering a single appearance or hearing anything that agreed with their preconceptions of insane behavior or conversation. Not only casual visitors, but officers of the institution, who have resided there for years, are often unable to distinguish at a glance patients from attendants without uniforms. This is worth considering when opinions are given upon insufficient examination of a patient, and particularly in the absence of a proper history of the case, and when there is the obscurity that accompanies so many instances of insanity.

Other things being equal, the alienist is better able to distinguish insanity than others who are not trained to observe it; and it is common for asylum physicians to observe imbeciles, paretic dements, and paranoiacs on the streets, often actively engaged in business. In all probability calling attention to the discovery would be attended with disagreeable consequences to the physician, and he is usually wise enough to keep silent. The most charitable construction that can be put upon the rapacity,

[1] As the Comic Blackstone has it: "There is some difficulty in distinguishing real from sham lunacy; for it is not in real life as it is upon the stage, where mad folks walk about with wisps of straw sticking in their hats, or carried in their hands, to show their insanity. If this practice was generally adopted the public would be much safer, for if every lunatic were compelled to carry a wisp, it would be seen that he was a man of straw, and consequently not responsible."

inordinate egoism,, and disposition to subordinate every sentiment in life to money making, by some of our most successful business men, is that they are mentally unbalanced; and stigmata of degeneracy can, all too often, be traced in them and their families. The extinction of such families is occasionally noticed as a direct consequence of the obliterative tendency of nature in deviations from a normal type.

The insane may be the first and only one to recognize the insanity in himself. Hypochondriacs, who are not insane, in the usual sense of the word, may fancy that they are, and seek voluntary commitment to an asylum. Physicians have recognized their own approaching mental break down, and also sought such seclusion.

Aside from the difficulties in the way of promptly ascertaining the kind of insanity, the question as to whether insanity does or does not exist, whether the person is sane or insane, is occasionally not easy to answer.

A positive diagnosis of actual insanity, and even of the kind of mental derangement in some patients, may often be declared at once, and others may be classified after a little observation; while still others may require considerable watching and more than partial information as to their acts and antecedents: and there will always be a minority who will, with the utmost endeavor, not only be difficult to diagnose differentially, as in determining precisely the kind of insanity, but whose very insanity will remain in doubt. Much of this doubt is due to an insufficient history of the case.

Apparent sanity occurs in the remission or intermission of some cases, and in lucid intervals. Real recovery may have been established when the patient is for the first time under intelligent examination.

The ordinary sick person facilitates examination by the physician, while the insane person seldom does so; and many of the difficulties experienced in treating children are encountered by the alienist in deciding as to the nature of the insanity or its existence.

The history of the case should be full, as to the heredity, predisposition, former diseases, or head injury, and concerning the use of alcohol or other drug addictions. A previous attack of

insanity should be known; whether there has been any character change, and in what way.

The presence of hallucinations, illusions, or delusions, and their character, may assist the diagnosis. The behavior of the patient, peculiarities about his person and surroundings, his conversation, and whether his intellect is abnormally active or is defective, should be considered. Hallucinations and delusions may be so outrageously absurd as to be justly considered the products of a diseased mind, particularly when better evidences of insanity exist; but it must be remembered that a delusion may be in all respects like the error of a sane person. Mendel,[1] in remarking that "an idea may also be correct and objectively true, but nevertheless be a delusion," relates an instance of paranoia, from the uneducated classes, who insisted that he had a tape-worm in his head, and upon his death embryo tape-worms were actually found in the ventricles of his brain. Some tape-worms that he knew were in his intestines suggested their location in his head. He had insanely interpreted certain feelings in his head, though their origin had been correctly guessed.

The emotional condition should be examined for excitability, abnormally painful or cheerful states, or perversion or the entire absence of emotion. The conditions of the memory and consciousness are of prime importance.

The acts and speech, with regard to changes in the latter, the ability to read and write correctly, are worth considering.

Eccentricity is a term so all comprehensive that alone it would not justify a decision where sanity is in question. Character asymmetry may include insanity, criminality, or what would usually be accepted by any community as sanity.

The color of the hair amounts to nothing, beyond the fact that gray hair may rapidly appear in some acute cases, and that the chronic insane preserve the hair color in age better than sane persons do.

Women with hair on their faces are often noticed in asylums, and are said to be more frequent than among an equal number of the sane population.

The sudden attack by and recovery from insanity are so fre-

[1] Tuke, op. cit. 375.

quently characteristic of degeneracy that a slow beginning and ending of a mental trouble give much more cause for hope of a cure.

The letter writing of patients may be guides to the commencement and termination of attacks.

In the early stages many mental disorders may resemble one another; and melancholic states may precede, for some time, greatly diverse forms. Stomach troubles very often precede and accompany melancholia.

Examining physicians for insurance companies should inform themselves so as to be able to recognize paretic dementia, for such patients are quite likely to be regarded as good risks, and they readily accept invitations to take out policies.

Menstrual reinstatement is of favorable prognosis if the mind is clearing up at the same time; but this physical improvement also occurs when mental disease is incurable.

Mere reputation of insanity is of no consequence in diagnosis, for it often attaches unjustly, and the people are so ignorant as to nearly all that pertains to mental disorder that they hold the vulgar notion that when anyone has been once insane he must always be insane. Every act of the one who is said to have been insane is scrutinized suspiciously by the public, and mere physical feebleness has been mistaken for symptoms of insanity in many cases. The vesanias, such as melancholia and mania, are, for the most part, so free from after-effects that such diseases are even less liable than typhoid fever, measles, or scarlatina, to have sequelæ.

Anomalies of sleep or epilepsy, found to exist in suspected cases, may clear up diagnosis.

There may be great diversity of opinion concerning notorious cases, as in the absence of exact information concerning the symptoms of insanity the public may fail to observe anything extraordinary in the conduct of the patient. The widely known *American Crow Bar Case* is an illustration. Dr. G. H. Fuller, of Buda, Illinois, a while before his death, in 1895, told me that he was acquainted with Phineas Gage at Cavendish, Vermont, who, while working on the Central Vermont Railway, had a tamping iron blown through his head, while engaged in tamping a blast in a rock. Subsequently, in 1849, Dr. Fuller met Gage peddling

pumps, and failed to notice anything peculiar about his behavior, except that he was irritable at times and drank hard. He was last seen by the doctor in 1851, and then he appeared to be reckless, and afraid of nothing; previously he had been rather timid. Gage remarked that had he known at the time how badly he was hurt he probably could not have survived.

The symptomatology of traumatic insanity was not known at that time sufficiently to secure accurate observation with reference to such matters; and the fact that the traumatic insane may appear to be sane to the uninformed, together with the sensational desire to be able to affirm that it is possible to have a great hole in the brain and yet be intact mentally, sufficed to give Gage the undeserved reputation of sanity.

When a patient is observed to be cherishing worthless articles, to be gathering bits of glass, scraps of paper, rags, and valueless things generally, hiding them away, or stuffing the pockets and the bosoms of dresses with such trash, the prospects are very poor for recovery, for it heralds the approach of what Hammond calls the "graveyard of the mind,"—terminal dementia.

Lucid intervals, particularly such as characterize the remissions or apparent recoveries of paretic dementia, and, in fact, in any form of insanity, give no warrant for believing that the affection itself entirely disappears with the symptoms that arise from it. Organic disease may exist without producing its usual symptoms, but in the interim of more obvious insanity some indications of the past, and probable future, cling to the patient. In ague a great contrast exists between the paroxysms and the subsequent stage, yet all will acknowledge that the person has ague in his system. An epileptic is none the less such during his freedom from attacks. A recovery from delirium, mania, melancholia, or transitory frenzy, is complete when it occurs, and even a relapse with the recurrence of the original causes does not negative this assumption; in this respect the vesanias are comparable to smallpox or typhoid fever, which may occur twice in the same individual, but the person is none the less free from disease in the interval. With degenerates, however, the maniacal, melancholic, or other, insanity is merely an episode, and in the periods between the acute stages the nervous and mental debasement of degeneracy persists, as does the physical stigmata with which it is so frequently associated.

Haslam,[1] an old, but none the less valued, writer on such subjects, states that "as a constant observer of this disease for more than twenty-five years I cannot affirm that the lunatics with whom I have had daily intercourse have manifested alternations of insanity and reason. They may at intervals become more tranquil, and less disposed to obtrude their distempered fancies into notice. For a time their minds may be less active, and the succession of their thoughts consequently be more deliberate; they may endeavor to effect some desirable purpose and artfully conceal their real opinions, but they have not abandoned nor renounced their distempered notions. It is as unnecessary to repeat that a few coherent sentences do not constitute the sanity of the intellect, as that the sounding of one or two notes of a keyed instrument could ascertain it to be in tune."

The principle of law which holds the civil responsibilities of the insane to be unimpaired during the lucid intervals may be justified by theory, and also be frequently found warranted by subsequent events; but even with the best of proofs that a restoration of the mind to its former state has taken place in this lucid interval, time and again it happens that insanity has not only been latent, but insufficiently observed, and great wrongs to persons and property constantly follow the restoration of civil rights to those who enjoy the so-called lucid intervals.

Lord Thurlow,[2] in a chancery case, stated that "by a perfect interval, I do not mean a cooler moment, an abatement of pain or violence, or of a higher state of torture, a mind relieved from excessive pressure; but an interval in which the mind, having thrown off the disease, had recovered its general habit."

But he further remarked: "The evidence in support of the allegation of a lucid interval, after derangement at any period has been established, should be as strong and demonstrative of such fact as when the object of the proof is to establish derangement."

In *Cartwright* v. *Cartwright*[3] it was held by Lord Wynne that a boisterous maniac who wrote a will while violently agitated

[1] Medical Jurisprudence as it Relates to Insanity, 224.
[2] Atty. Gen. v. Parnther, 3 Bro. Ch. 441.
[3] Phillim. 90.

must have had a lucid interval at the time, as the will made a natural and consistent distribution of her property, and, in short, "it was a rational act, rationally done," and from this he inferred that she must have been visited by a lucid interval at the moment of making the will. "For," said the court, "I think the strongest and best proof that can arise as to a lucid interval is that which arises from the act itself; that I look upon the thing to be first examined; and if it can be proved and established that it is a rational act rationally done, the whole case is proved." Rational conversation of a maniac would also constitute a lucid interval, according to the same judge.

Testamentary capacity was thus confounded with a lucid interval, as one and the same thing. While the former may have existed, the latter was by no means proved. A chronic maniac, such as the testatrix, could not have had a lucid interval any more than a remission could occur in leprosy.

The comparison of lucid intervals to a "temporary cure," when based upon a few rational acts, is improper, for most of the insane are capable of apparently rational acts which, when fully understood, are known to be instigated by the continuance of insanity. The "rational" acts and conversation of a paranoiac usually flow from absolute insanity; and to make what appears a rational act the evidence of a lucid interval would be equivalent to arguing that temporary life was present in a decayed corpse.

The lucid interval has been defined[1] as "such a restoration to reason as will enable a subject to comprehend and do an act with such reason, memory, and judgment as to make it a legal act." It might be safer, and certainly would be more logical, to recognize the validity of certain apparently rational civil acts of the insane, when the proper interests of all concerned are conserved, without regard to the mental state of the patient during the so-called "lucid interval."

Physicians know that certain diseases may have remissions, and others intermissions, while relapses may occur in the course of convalescence; and that it is the rule that some ailments are exhausted and never repeat themselves in a lifetime, with occasional exceptions. Similarly, the alienist is able to distinguish

[1] 11 Am. & Eng. Cyc. Law, 112.

apparent recovery from the actual recovery, and regards a large number of the periodical and degenerate insane as incapable of lucid intervals, however it may appear to the inexperienced. The utmost care should be exercised in determining such matters, to avoid injustice; though undeniably even degenerates may be restored to the *status quo ante*, and their acts have as much validity as it is possible to assign to defectives in general; for even imbeciles may be entitled to property and other rights if their mental states permit, but they are none the less imbeciles.

The position of criminal law with regard to lucid intervals is to be commended as a redeeming feature among the many inconsistencies and false principles which mark legal estimates of insanity. No one who is admitted to be insane within a short period of time before the criminal act with which he is charged is liable to be held to accountability.

Concealed insanity. According to Larroussine[1] "dissimulation is most common in the severe and dangerous forms of insanity. Victims of persecutory delusions conceal their thoughts in order to be able to work vengeance on their supposed enemies; other lunatics do so in the belief that their own interests will be thereby advanced, or, and especially in women, they are led to deception by a sense of shame. This dissimulation in the insane is not necessarily limited to their own interests, for they cause other patients to be as secretive as themselves. The dissimulators most inimical to society are those subject to chronic persecutory insanity. Great caution should be observed before allowing these patients to leave the asylum."

This ability to keep symptoms in the background indicates considerable self-restraint, and may lead the most experienced observer astray; but certain forms of insanity, like paretic and terminal dementia, do not admit of concealment. Maniacal and expansive emotional states are seldom repressible, but in melancholia there may exist relative intellectual integrity and great fixity of purpose. Delusions may be hidden for months, and the patient may sustain a severe cross-examination concerning them, and successfully lie on every point. Cheerfulness may be assumed to enable the patient to commit suicide. Some melancholiacs

[1] Progrès Médicale, 1895.

seek sympathy, and are glad to confess their shortcomings and fancied unworthiness, while others will not talk about their feelings.

A recovery may be mistaken for dissimulation, or the latter for the former. Healthy interest in surroundings is hard to feign, as the self-absortion of insanity is apt to interfere with an attempt in this direction.

The delusions of paranoiacs are most apt to be concealed, though the patient is not so apt to deny his delusions as to evade answering questions concerning them.

The desire for liberty is the prime cause of concealment of delusions. Letter writing may reveal an insanity that exhibits itself in no other way.

It is probable that successful dissimulation is frequent, and explains the many so-called relapses of liberated lunatics, except the relapses of alcoholic lunatics caused by resuming the use of liquor.

Feigned insanity. The gathering of lunatics into special institutions, while affording physicians excellent opportunities for the study of mental diseases, debars the general practitioner from familiarity with the peculiarities of the insane, and places him at the most disadvantage when he is called upon to ascertain whether a person is shamming insanity or not.

The popular mistake that everything about insanity is so confused gives rise to the further blunder that it is easily simulated, when, on the contrary, it is most difficult to pretend insanity well enough to deceive one who is familiar with its symptoms. Haslam[1] declares that "to sustain the character of a paroxysm of active insanity would require a continuity of exertion beyond the power of a sane person." Conolly[2] affirms "that he can hardly imagine a case which would be proof against an efficient system of observation." Ray[3] states that "to urge, as against the free admissions of insanity in excuse for crime, the extreme difficulty of detecting attempts to feign it, can no longer be anything more than the plea of ignorance or indolence. The only effect such

[1] Op. cit. 322.
[2] Indications of Insanity, 467.
[3] Op. cit. §§ 342, 351, ed. 1853.

difficulty should have on the minds of those who are to form their opinions by the evidence they hear, should be to impress them with a stronger sense of the necessity of an intimate, practical acquaintance with insanity on the part of the medical witness, and convince them that without this qualification the testimony of the physician is but little better than that of anyone else."

Impostors adopt the most difficult form of active insanity to imitate, and between their clumsy overdoing and the great strain necessary to maintain the character, a feeble caricature is the result; particularly when, as is most often the case, the malingerer knows nothing about insanity except as he has seen it represented on the stage or described in novels, by actors and authors as ignorant of the subject as himself. To prevent this assumed insanity from being overlooked he unavoidably commits inconsistencies and often breaks down and discontinues his efforts. In mania, memory and the ability to recognize friends are even better than in health, whereas the pseudo-maniac will pretend to have forgotten everyone and everything. The maniac does not stop to consider what he will do next, but the pretender has to cogitate as to his next move. Irrelevant answers are not common with the insane, but the pretender resorts to them as if they were. The real madman will wander off to other topics, answer your questions, or keep silent. If the moral inversion and antipathies of insanity towards relatives is known to the simulator it usually occurs to him as an afterthought when he may have previously shown nothing of the sort. The proprieties are set at defiance by the genuine maniac, but the pretender is careful not to give what he considers unnecessary offense. A continued rapid pulse may enable real mania to be detected, when the acceleration occurs only in the more active essays of the one who feigns.

Sleeplessness, so constant and complete in mania, it is impossible for the simulator to maintain. He will fall off into sound slumber in spite of all endeavors to keep awake and rave.

A sudden invasion of mania may occur in one of the degenerate type, but the usual beginning is a slow one, marked by prodromal features. The pretender necessarily begins his outbreaks when most necessary for him to be recognized as insane. The irritability of mania is usually disregarded in feigning, or a clumsy attempt at passion may occasionally be made. There is a bold,

unflinching look in real mania, that is not imitated by the pretender, who usually averts his gaze from observers.

Idiocy, imbecility, and senile dementia have been drawn upon, but their imitations should be easily distinguished as such by competent persons.

A common method of catching malingerers is to narrate some symptom as an insane one that is being looked for, and probably the next day it will be forthcoming.

The apathetic forms of insanity would be less difficult to feign, but even with them there are unfailing evidences of sense obtuseness that may not be so accurately imitated but that resort to cruelty can be avoided in deciding upon their absence.

A quiet dementia would be the easiest possible to copy, and the most difficult to determine as simulated; but the previous history and unguarded acts would betray the sham. Similarly, a feigned, quiet melancholia may be next to impossible to detect, though the physical evidences of constipation and gastric disturbances, with whatever history can be obtained, may be some guide; but unfortunately such physical symptoms are not present in all cases of melancholia. Their absence, however, might raise a doubt of the genuineness of the insanity.

M. D. Field[1] reports a case of simulation of a stuporous form of insanity, with the difficulties encountered in its study, and all works on forensic psychiatry narrate instances in general; but the main principles are more serviceable than the detailed accounts.

An intelligent jailer, or his assistants, can be of great value in getting at the truths in such cases, as their statements of acts and what has been observed enable the alienist to interpret many things of importance. But in cases of attempts to stupidly manufacture evidence, the physician will be misled, and justice may be defeated. It is best to scrutinize such testimony carefully.

Epilepsy is frequently feigned by criminals, often to secure money or commiseration, or to escape sentence. The pallor, pupillary dilation, and the other regular phenomena of convulsions cannot be entirely feigned successfully. The criminals come in contact with epilepsy so often that they have opportunities for observation of the disease.

[1] Journal of Nervous and Mental Disease, June, 1890.

The genuine epileptic may also be able to bring on an attack voluntarily, and there are complications of criminality and epilepsy, other than these, that present considerable difficulty in detection. It might be well to inform a suspected malingerer that real epilepsy has been instituted by its pretense, and such information may deter the simulator from further efforts.

Bevan Lewis[1] discusses some phases of epileptic simulation, with reference to medico-legal points.

Simulation of insanity by the insane is thus summed up by Leon Charnel,[2] of Belgium: "In cases of insanity where the intellectual faculties are not too much disordered, the insane may simulate another form of insanity than their own. The forms most often simulated are, in order of frequency, imbecility, dementia, and mania. The other forms are not as frequently simulated. A lunatic generally simulates insanity to escape punishment, and an expert physician should not, therefore, in such cases, be satisfied with a diagnosis of simulation. Such diagnosis does not exclude real insanity, and the physician should, therefore, endeavor to ascertain whether or not the simulator is himself a lunatic. With care, patience, and long-continued observation, it is possible to make a complete and correct diagnosis, and this is the more important as in these matters a serious question of responsibility arises."

A common trick of the insane who attempt a pretense of insanity is the holding of their hands to their heads, as though suffering from headache, appearing to imagine that brain disturbances of any kind are attended with pains in the head.

Cases of feigned insanity. Hastings, a paranoiac, on trial for the killing of a real-estate dealer named Hildreth, in Chicago, sat in the court-room, looking at the floor, and holding a hand to his head; he drawled out his answers slowly, but always to the point, and pretended to be demented or melancholic. Upon his verdict of acquittal he at once changed to cheerfulness, and laughingly boasted of his success with the "insanity dodge." Yet Hastings was a decided "phrenasthenic," and his entire family was badly degenerate.

[1] Text Book of Mental Disease, 246.

[2] Bull. de la Soc. de Med. Ment. de Belgique, 1895.

Dacey, who murdered alderman Gaynor of Chicago, was tried, on a change of venue, in 1886, at Woodstock, Illinois. The prisoner was of the criminal politician type, and when known to be under observation in his cell pretended to be violently maniacal. He carefully refrained from obscenity, though all his life he had not been choice in his use of expletives. He did not attack anyone, and when watched without his knowledge he quieted down. He had many scalp wounds from fights in which he had been engaged, but no claim of traumatic insanity was raised on the defense.

One physician claimed that he was an insane man simulating insanity; another asserted that Dacey had the "maniacal eye." The doctors who appeared for the defense were separately examined, without time for consultation among themselves, and one claimed that Dacey was a "maniac with depression," another that he had "both melancholia and mania." There were opinions from other medical witnesses to the effect that the prisoner was "a chronic maniac approaching dementia," and that he was "a syphilitic insane case with delusional insanity." Dr. Cronin, whose mysterious murder created such a sensation subsequently, was of the opinion that Dacey was an imbecile, but later he regarded him as a case of circular insanity. He testified that circular insanity and melancholia were identical.

The fact is, none of these medical gentlemen had more than the general practitioner's familiarity with insanity, and none of them had time to study the literature enough to form plausible theories.

Dacey simulated an attack of epilepsy in the court-room, but it was bunglingly performed, and he did not appear to know about the sleep periods that usually follow epileptic attacks.

On the gallows he confessed to his attempts at feigning, and showed regret for his life of crime.

Dr. Scudder, in 1892, was seen by a servant girl in the act of killing Mrs. Dunton, his mother-in-law, by beating her over the head with a pair of heavy obstetrical forceps. Her skull was found to be fractured. It was in evidence that he had treated Mrs. Dunton for some time during a protracted illness; that she had resisted a hypodermic injection which led to the attack; and that Dr. Scudder had forged a will, signing the name of Mrs. Dunton,

and during the funeral was discovered in an attempt to secretly take possession of the former will, and stupidly pretended that the tin box containing it accidentally stuck to the shawl he was carrying. Mr. Dunton, the father-in-law of the prisoner, nearly died immediately after taking some medicine given to him by Scudder. A sister of Scudder died under circumstances that led to his being accused of having killed her with hypodermic medications. The first wife of the accused also died mysteriously after being insured for a large amount.

By some adroit management, when Scudder was arrested he was taken to the detention hospital for the insane, where he began to simulate mania. Later he was transferred to jail and soon gave up his too difficult methods of pretending insanity. He finally committed suicide by taking a large dose of morphine that had been conveyed to him. The public interest in the affair was considerable, and as some acrimonious newspaper attacks were made upon the survivors of the Dunton family for the purpose of mitigating the atrocity of the murders, I was requested by the state's attorney and his assistants in the prosecution to prepare a report setting forth my investigations and reasons for believing that Scudder was not insane. This report is appended as published August 13, 1892:

"After having been called upon by the state in the case against Dr. Scudder I noticed that when taken to the detention hospital for the insane he simulated mania, and claimed to have delusions and hallucinations quite inconsistent with the belief that he was really insane. He took pains to explain the reasons for any apparent insane behavior. For example, he told Laus, a patient in the hospital: 'You are in league with my persecutors.' Similarly, he accused his father and wife of being banded with his persecutors.

"I have known insane physicians who acted upon their delusions and hallucinations without attempting to explain that they were laboring under a delusion and hallucination, as in this case. When one is insane the unreal is so real to him that he is unable to separate the two; much less is he able to call the attention of bystanders to such difference. His assault upon Peter Laus by striking him over the head appeared to be an attempt to account for his attack upon Mrs. Dunton. Previous to his arrest nothing

similar occurred; his violent demonstrations against his wife and father were suspicious as occurring only after the murder. Watched through the keyhole of his cell he appeared to be rational, and with his half knowledge of insanity he made the mistake of adopting the occasional active form for pretense. This is the most difficult to sustain for any length of time by the simulator. Had he adopted the passive or apathetic method his success would have been better assured. In the active form he committed inconsistencies and betrayed himself, owing to its requiring more constant effort. He informed others frequently that he saw faces and heard voices in the dark, to impress others that he was hallucinated. The insane seldom, if ever, do such things.

"Until the night of March 5 Scudder showed no disposition to be violent and his pretense covered many of the forms of insanity (each form of insanity has its own separate symptoms, and is not a jumble of symptoms as the uninformed would imagine), and his attacks upon his fellow patients appeared to be feints. His opportunities to study insanity should be taken into account. The lunatic with hallucinations of hearing does not explain, but acts. After making the attacks he continuously repeated, 'They told me to do it; it could not be helped; it had to be done,' and claimed that the 'voices' told him that Laus was in league with his wife, and therefore he attacked him.

"There was strong proof of design in the events. The forgery of the will and of checks, and the attempted deliberate theft of the will, should be compared with the subsequent aimless assaults of Scudder. His manner of assaulting Mrs. Dunton and, attempts to conceal his crime were quite different from his subsequent open obstreperousness.

"He did not claim that the voices told him to pick up the shawl with the box containing the will. He did not try to explain his action in that way at that time, and it is worth noticing that he singled out Mrs. Dunton instead of making aimless onslaughts on others, as he did at the hospital. He even withheld his hand from the servant girl, Hannah Johnson; he merely glared at her significantly. He made frequent use of the word 'persecution,' as he had probably read the terms 'delusions of persecution' in medical works. The insane do not as a rule

speak of being persecuted, even if they have delusions of persecution.

"March 10, in the jail, Dr. Scudder refused breakfast and dinner, claiming that his food was poisoned, but he took his supper. When delusions of poisoning occur the insane seldom, if ever, mention it, but continue to refuse food for months without giving reasons. That the delusion should exist but for a few hours is suspicious. In a long conversation with him in the jail I failed to discover anything but rational behavior, nor were there any physical evidences of insanity apparent at that time.

"The alleged delusions of persecution were not fixed or persistent in his case, as he greeted his father and Dr. Noble differently at successive visits. He was not a maniac or melancholiac, for his recovery in jail was too rapid. Paretic dementia may be dismissed for the same reason. Nor did he suffer from paranoia, for he gave up his delusions of persecution, and received the family affectionately after having turned against them previously. The paranoiac is continuously, persistently, consistently, and usually ostentatiously insane, and manifests his delusions accordingly.

"The diagnosis of insanity upon a single instance of his having washed his hands at one time is absurd. In 'mysophobia,' or fear of contamination, the lunatic is usually hopelessly insane, and the hand-washing may occur hundreds of times a day instead of once, as observed in this instance, and mysophobia may exist without insanity.

"It is noticeable that the prisoner slept fairly well, with few exceptions. It is probable that traumatic insanity was to be the main defense, based upon the claim of a sunstroke in India. But in this form of insanity there are, in addition to continuous sleeplessness, persistent irritability, complete change of character, loss of memory, and intolerance to heat and alcohol, passionate and aimless outbreaks, delusions of persecution and frequent headaches. When there is a decided motive for a pretense of insanity it is suspicious when each of these separate symptoms occurs at widely different times. If a man commits a murder in January in a deliberate manner, and in February has a maniacal attack, and in March is sleepless, in April is irritable, and in May drops all his peculiarities and appears to be sane, traumatic insanity may well be doubted.

"Although apparently sane intervals may occur in the course of traumatic insanity, it was quite remarkable that Dr. Scudder regained his reason immediately after Dr. Spray advised him to stop the insanity dodge. The homicidal attempts of most insane persons, especially those who suffer from head injuries, are aimless. Although design may be manifested by a lunatic, as a rule in traumatic insanity there is at least insufficient motive. I never heard, as alleged in this case, of a traumatic lunatic forging a will in his own favor and murdering the testatrix.

"It is noticeable that where insanity is feigned a motive for feigning always, and an attempt to escape punishment usually, exists, and there is no well-authenticated evidence of previous insanity; that the simulator always over-acts his part, especially if mania is chosen; that acts are committed which are incompatible with the form of insanity assumed; that there is an inability to maintain the excitement without fatigue; that there is an inability to do without sleep; that the pretender alters his behavior when he thinks himself unobserved; that the imitation of the form of insanity is incorrect; that there is pretended loss of memory, though this occurs in but few forms of real insanity, and that the pretender will often say that he is suffering from delusions, hallucinations, and the like. An insane person never speaks in this way. Opium acts more powerfully on the simulator than on the real lunatic. Dr. Scudder seemed to be quite susceptible to opiates. With pretenders there is an absence of objective symptoms, such as rapid pulse, furred tongue, flushed or pallid face, injected eyeballs. Dr. Scudder had none of these appearances.

"The insane person who commits murder usually does so without a motive or with a trivial or outlandish motive. There is seldom an attempt at concealment, and frequently there is even boastfulness concerning crime. The history of insane or nervous heredity and of conversation and conduct indicates in such cases the existence of mental aberration before the commission of the crime.

"At the coroner's inquest the medical gentlemen employed by the defense were quite positive that the *post mortem* brain appearances indicated possible, though not necessary, insanity. The conditions, as described, have been found in numberless instances

in perfectly healthy brains, and those same gentlemen were equally positive that Scudder had not poisoned himself with morphine, as the symptoms did not indicate it. Subsequently Dr. Haines, of Rush College, found morphine in the stomach—'morphine abundantly present in much larger amounts than even the full remedial dose.' Since these gentlemen were proved to be mistaken in the diagnosis of the cause of death in the stomach matter as far as the suicide is concerned, are they liable to be infallible in their judgment of the brain condition indicating insanity?

"The simulator makes the mistake generally of allowing his feigned disorder to explode as well as to recede too rapidly. The crime, its motive when committed, and the behavior before and after the crime, are important elements in the diagnosis between simulation and insanity in criminals.

"I am constrained to believe, after a careful examination of all the circumstances, that unless an undue appetite for money, which too often develops unscrupulous means for obtaining it, can be considered insanity, Dr. Scudder was not an insane person, but was simply the kind of man with which the early centuries abounded. In the nineteenth century, as a rule, hypocrisy is necessary and too often effective in covering the tracks of such men."

CHAPTER VI.

CRIMINAL CASES.

Crime in general can be but superficially considered in a chapter which is not "as long as the moral law."

Of all the sciences sociology is the most intricate, for it includes all other branches of human knowledge, and concerns the relations of man, not only to his fellows, but to the universe as well. Yet offhand opinions on the most abstruse of these relations are instantly given, with a readiness inversely proportioned to reflection and profundity. The farm-hand has infallible theories of government, and occasionally, when he becomes a legislator, puts them to the test in statutes which, while remedying minor, create major evils. Sailors know what landsmen should do under all circumstances, and landsmen make laws for the sailors. The secretary of war, a civilian without military training, always knows what the generals in the field should do to win battles, and the latter are constantly resenting such interference. The narrow-minded medical man despises the law as an empty system of formalities. The lawyer of similar calibre retorts with contempt for the fallibility of medicine; the anarchist would substitute chaos for any human attempt at order, and the executive too often resists the impediments in the way of his efforts for the welfare of all,—impediments that are grounded in an eternity of causes.

The history of civilization shows that well-intentioned reformers have often delayed progress in their mistaken zeal; for institutions grow, evolve, and cannot exist until the time is propitious.

Law is a science intended to minimize the confusion arising in the settlement of disputes, and the grand intellects engaged in its advancement have achieved much; but a jurisprudence founded upon a full recognition of the advances made in collateral branches of knowledge will be possible only in a more intelligent era.

That an army could move only as fast as its slowest member was true when military operations were primitive. The ambulance now assists the soldier somewhat as the substitution of principle for precedent would accelerate the progress of the jurist, with the added analogical risk that the vehicle may be decrepit or overloaded.

Lord Bacon wrote: "It were good, therefore, that men in their innovations would follow the example of time itself, which indeed innovateth greatly but quietly, and by degrees scarce to be perceived." In the main it is fortunate that the law is slow to change, for otherwise the greatest confusion would be inevitable; but, on the other hand, astonishingly unwarranted reverence for precedent abounds in the common law and influences the tenor of statutory law. But on this point a member of the bar may be quoted. In an address delivered before the Illinois State Bar Association, at Springfield, in January, 1896, Mr. James C. Courtney took the ground that the common law is weighted with unwise principles and provisions; that the wisdom of the common law has been praised too much. Citing the advance that has been made in every other branch of science, he remarks that in law the foolish conceits of our ancient ancestors are passed along from age to age as rules for our guidance and enlightenment; that for ages judges and lawyers have used such expressions as "the common law is the embodiment of wisdom," "the perfection of reasoning," "the greatest birthright," etc. On this point he says:

"The common law is not the embodiment of wisdom, neither is it the perfection of reasoning. In the very nature of things it could not be so. It had its origin in the usages and customs of a semi-barbarous age, and the stream can never rise higher than its source. The common law is an exponent of the habitudes of life. It is a creature of man's handiwork, and by consequence is beset with man's imperfections and infirmities. The virtues and the vices; habits and customs; fads and fancies; the good and the bad, all colored by the spirit and temper of the age,—these are the component parts of the common law, and these are all woven together as warp and woof in the great loom of the people's life; the fabric in its completion shows the impress of each; and this is the common law in its entirety. In the formative periods of the common law, the most excellent wisdom and the most profound

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ignorance dwelt in harmony together. The phantoms of ignorance, and the hobgoblins of superstition, all walked abroad in the light of the splendid genius of Bacon and Shakespeare."

Then, admitting that there is also much wisdom in the common law, Mr. Courtney says that many of its rules, wise in their application to the conditions which gave them birth, have, by reason of changed conditions, become unwise, and that what is needed is reconstruction, elimination, and a new arrangement of things. In support of his argument he notes, among other things, the condition of the common law with reference to "seals," saying:

"Many hundred years ago, when illiteracy prevailed almost universally, when man was just emerging from barbarism and the gloom of superstition hung about him, and when not one in ten thousand could read or write, the transmission of real estate was effected by livery of seisin and by the grantor attaching his seal to the parchment. The grantor being unable to write, this seal represented his name, and, under conditions then existing, was a wise requirement. But see how a wise law in its application to conditions of a medieval age degenerates into folly in its application to the conditions of civilized age. First, waxen seals were necessary, but now our modern judges tell us that zigzag marks or little round dots will do. The supreme court of Pennsylvania, in *Hacker's Appeal*, 121 Pa. 204, 1 L. R. A. 861, favors us with a learned exposition of the law on this subject. 'Any kind of a mark after the name that fancy may suggest is sufficient,' says the learned court in this case. And so a little dot, the sixteenth part of an inch in length, was held by the court to be a good seal. But the court was careful to say that a dot or a wiggle made by the pen after the signature was necessary. And this blight in the law as to these trifles is not alone confined to deeds, but, like a baneful disease, spreads about in every nook and corner of common-law jurisprudence. In evidence, sealed instruments, like a king, are hedged about, shielded from attack, and invested with imperial importance. No matter how many mistakes the writing may contain, no matter how false it may be, if there be a zigzag mark of the pen after the signature, the voice of truth is silenced, and nothing can be said. Reference to a case or two will yield good results at this point. The case of *Hume* v. *Taylor*, 63 Ill. 43, is instructive. Hume sold to Taylor 1,000 hogs.

A written contract was signed for the delivery of these hogs. This contract had a little mark after the signatures of the parties. Each of the parties signed a note to the other for $5,000, and placed it in the hands of a third party as a guaranty of the performance of this contract; but before the time for the delivery of the hogs had arrived, the parties changed this contract, substituting 500 hogs for 1,000, and wrote this new contract on the back of the old one; and each of the parties signed his name to this new contract, and defendant offered to deliver the hogs under the new contract. But the supreme court held under these facts that the plaintiff was entitled to recover on the note placed as a guaranty, for the reason that the original contract was not changed, because there were no marks after the names of the parties to the new contract to represent a seal. And so the defendant lost $5,000 for the want of a little mark after the plaintiff's name.

"And the rule in *Shelley's Case* is not a whit less absurd. The facts of this ancient case show that its determination was based on the doctrine of primogeniture. One illustration: Once upon a time an old German lived in Chicago. He was the owner of certain lots in that city. He was blessed with four sons, and each of these sons had children. This old gentleman, like many other grandparents, was very fond of his grandchildren. With a sound mind and memory he writes his last will and testament. He wishes to give these lots to his sons during their life, and after their death he wants them to descend to his grandchildren. So he says: 'In the name of God, amen. I give and devise unto my sons lots 13, 14, and 15, in Chicago, but neither of them shall sell or mortgage any of the lots, but the same shall go to their heirs after them.' Nothing could be clearer than that this old man intended these lots to go to the sons during their lifetime, and that the grandchildren should take the fee simple. The sons become dissatisfied, and bring suit. The case goes to the supreme court of Illinois. And this will, a plain instrument without ambiguity or doubt, is taken by the court and placed in the pillory of the dark ages, so to speak, and subjected to the thumbscrews of the rule in *Shelley's Case*. And the result is that the sons get the fee simple and the grandchildren get nothing. And this is

the wisdom of the common law. The curious will find this case in *Hageman* v. *Hageman*, 129 Ill. 164."

In closing his address, Mr. Courtney says that the great remedy for all the evils of our law is less regard for ancient precedent and greater regard for common sense,—more modern instances and fewer ancient saws.

Probably the laws relating to patents, having arisen during periods of increased mechanical knowledge, are less hampered by legendary *dicta;* and as a hint of what the future is likely to contain, by way of a better understanding between the legal and all other professions, attention is called to the deference for mechanical principles shown by the bench and bar in patent contests. Instead of the failure of forensic medicine as a profession, wherein the medical attorney pretends to sufficient knowledge of both law and medicine as applicable to all cases, it will be found that proficiency in a single branch of legal medicine, such as forensic psychiatry, or forensic toxicology, is alone possible. The day has gone when one person could compass what was known in the fields of law and medicine. The specialist of our time finds that international, corporation, criminal, and various divisions of the civil law, surgical branches, the treatment of the eye and ear, mental diseases, throat and chest affections, female diseases, etc., require a lifetime of study and industry to acquire anything approximating ability in any one department.

Criminal anthropology. Havelock Ellis[1] classifies criminals as (1) the criminal by passion; (2) the occasional criminal; (3) the habitual or professional criminal; (4) the instinctive criminal; (5) the criminal insane.

The criminal by passion is one who has acted on the spur of the moment, as in resenting an injury to his family. These persons are distinguished usually by their previously good life and their genuine remorse.

The occasional criminal is one who is not naturally inclined to crime, but is weak and easily led. Bad heredity is prominent in this class.

The habituals criminals are made up of the weak or helpless and those who deliberately adopt a career of crime. The

[1] The Criminal, 1890, Contemporary Science Series, London.

professional is the aristocrat among criminals, and is often highly skilled.

The instinctive criminal (congenital or born criminal) is regarded by Lombroso as morally insane. His type is of the clearly degenerate stock.

The insane criminal is an exaggeration of the instinctive criminal, according to the Italian school[1] of anthropology; and French writers[2] also adopt this view, over which, in the present state of the law and of popular feeling, there could be endless wrangling.

Two noted journals are devoted to the subject.[3]

The heads of criminals differ little from the average, both extremes of size being more frequent than the middle-sized head. Thieves more frequently have small heads, and murderers large heads. Abnormal skull shapes are frequent. The weight and size of the lower jaw are above the average; prominent, large, and outstanding ears are observed in 39 per cent of criminals as against 20 per cent of noncriminals; wrinkles are precocious; the beard is scanty, but the hair of the head is abundant; the dark-haired is more common than the light-haired criminal, in proportion to the population. Pigeon-breasts, imperfectly developed chests, and stoop-shoulders abound; heart-disease is common, and anomalies of the genitals are often found in sexual offenders.

Of 4,550 inmates of the Elmira, N. Y., Reformatory, 539, or 12.8 per cent, have been of insane or epileptic ancestry; 23.03 per cent of the Auburn, N. Y., prisoners were of insane, epileptic, and otherwise neurotic ancestry, among 233. Bad heredity is recorded by all penologists and anthropologists as existing through disease of some kind in the parents, in from 46 to 90 per cent of the cases. Many criminals were the children of very old or very young parents. Drunkenness existed in about 40 per cent of the parents of criminals, as opposed to 15 per cent for normal persons.

Despine[4] studied the matter of moral insensibility of the criminal, and ascertained that those who premeditate and

[1] Lombroso, L'Uomo Delinquente, Turin.

[2] Corre, Les Criminels, Paris; Laurent, Les Habitués des Prisons, Paris.

[3] Archivio di Psichiatria, by Lombroso, in Italy; and Lacassagne's, Archives de l'Anthropologie Criminelle.

[4] Psychologie Naturelle, 1868.

commit crimes in cold blood never experience moral remorse. He found also that those who manifest acute sorrow and real remorse after a criminal act have committed that act either under the influence of a violent passion which has momentarily stifled the moral sense, or by accident without intention. He concludes that the two great psychical conditions for crime are moral insensibility and perversity, with two accessory moral anomalies, imprudence and lack of foresight.

Care should be exercised in examining such cases to ascertain if penitence is real or assumed; the former being less obtrusive than the latter.

Marro[1] found a noticeable defect in intelligence in twenty-one criminals out of 500, and that incendiaries first, and then murderers, yielded the largest proportion of individuals with defective intelligence; then came vagabonds, sexual offenders, those convicted of assault, highway robbery, and simple theft. The fraudulent class, as well as the pickpocket and burglar, showed no instances of defective intelligence. Criminals against the person show a lower level of intelligence than criminals against property.

Ellis[2] remarks that "the two most characteristic features in the intelligence of the average criminal are at first sight inconsistent. On the one hand he is stupid, inexact, lacking in forethought, astonishingly imprudent. On the other hand he is cunning, hypocritical, delighting in falsehood, even for its own sake, abounding in ruses. These characteristics are fully illustrated in the numerous anecdotal books which have been written concerning crime and criminals."

Intriguery and duplicity, which amount to the same thing, are attributes of criminals and savages, merely developed from common animal cunning; and the higher intelligence despises, and is even incapable of, the so-called diplomacy, which is rapidly being relegated to the limbo of medieval manners and customs. There is no such diplomat as the intelligent criminal on the large scale.

Abundant opportunities for easy study of such peculiarities are afforded in members of the city council, county commissioners, and occasionally legislators elected to office from some of our larger cities. Many of these criminal politicians regard honesty as mere

[1] 1 Caratteri dei Delinquenti, Turin.

[2] Op. cit.

stupidity, and they actually cannot understand why anyone should forego an opportunity to rob, especially the public, except through lack of courage or wisdom, as they conceive such qualities.

Ellis asserts that the vanity of criminals is marked, and they are quite frequently sentimental; that religion or superstition is common, while free thinking is rare. They are lazy, with capacity for violent activity. They crave all forms of stimulants, and are addicted to gambling. Orgies or violent debauches are characteristic of criminals.

Many criminal traits are apparently reversions to savage peculiarities.

Savages and criminals are very often lefthanded; both are addicted to tattooing the person, and the stupidity or cunning of the criminal is closely related to that of savages and lower animals. Common criminal titles are "the fox," "the cat," "the bull dog," etc. The love of revenge predominates in both savage and criminal, and bestial tendencies generally, especially the sexual, are observable among savages, criminals, and some insane.

Anthropologists have not devoted much time, as yet, to the highest and most respectable class of criminals, but their study will not be much longer delayed, for their increase in numbers threaten the existence of decent government and institutions.

Sexual offenses appear to be among the more common royal delinquencies, instead of the other forms of licensed criminality of the former ages. "Morganatic marriage" means more than its dictionary definition. Polygamy and illegitimacy are concerns of commoners. Treason, not of the Benedict Arnold kind, but quite as dangerous in sapping the strength and resources of the country, is practised under the guise of "statesmanship" through syndicate operations in Congress and elsewhere. Incendiarism is occasionally resorted to by wealthy insured respectables when an emergency arises in their finances. Demagogues in all avenues of life, and mercantile bribers of those who have charge of the sick, insane, and paupers, are none the less thieves and murderers because they do not immediately witness the privation, sickness, and death in which their filchings from these unfortunates more or less directly result. Everyone knows of such instances; but we have acquired separate standards of right and

wrong for those who can and those who cannot practise crime with safety. The most intelligent criminal is really the most dangerous, and it is he whom the later ages will look after, as closely as now the miserables are hounded.

The record of the trial in Philadelphia, in 1895, of H. H. Holmes, who murdered several persons from combined mercenary and bloodthirsty motives, abounds in such horrible details that death seems insufficient punishment for such a monster. His general intelligence was above the average; and his abilities applied in ordinary channels would have been well rewarded. In other countries such fiends are often leaders of banditti, ladrones, and guerrillas. The pirates and European armies of mercenaries in the middle ages, and, in fact, the feudal period generally, gave to criminals of the Holmes type a respectability that can no more be appreciated now than the remote future will be able to understand our reverence for a similar misdirected intelligence that corrupts legislators, and, in multitudes of other ways, seeks to glut its rapacity by remorseless means. Vast commercial operations often legitimatize human sacrifice and robbery on grand scales. The advance of knowledge and the increase of thoughtfulness will enable the community to single out the persons directly responsible for wholesale murder and pillage; though Bellomonts will be frustrated by Kidds, as in the time of King William, when the New York pirates had behind them as respectable commercial support as to-day can be counted upon by some great political and syndicate organizations.

Forensic psychiatry would be incomplete, and behind the age, if it did not at least indicate what will soon become new inquiries within its scope,—the operations of criminals in higher places.

Criminality or mental warp is none the less such when exhibited by officials. The greatest anarchist, said Ingersoll, may be one who wears the ermine. A prosecuting attorney is occasionally found who counts his convictions as the Indian does his scalps, the latter by notches or "coups," and the former by victories regardless of the innocence or guilt of the accused party. Future psychological studies will characterize that species of homicidal propensity as defective intelligence due to moral imbecility, instinctive criminality, or mere native savagery.

The populace in times of public excitement is often as devoid of reason as the maniac; and genuine paranoiac logic abounds at such times to justify the execution of lunatics, or to promote international quarrels and war. Trials controlled by popular clamor are lynchings; and the lynching spirit permeates, at times, the entire solemnity of the proceedings. Let jurists calmly inspect the records of many notable trials, beginning with that of McNaughton, and observe how the determination to avenge a conspicuous homicide overcomes all opposition, particularly such as would exculpate the offender on the ground of insanity.

The savage sentiment is often expressed that the insane should be destroyed anyway. The Indian is moved by similar motives to abandon his chronic sick and aged to the wolves.

Insanity as a defense. Chief Justice Parker of New Hampshire in a charge to a grand jury[1] made a just and humane summary of the prejudices, passions, and ignorance in many protests against the insanity plea; though the greatest impediments to the sufficiency of such a defense lie in legal constructions of what constitutes mental disease, and its accountability for crime. The inconsistency of the law in seeking general principles from widely differing diseased states is still more apparent in further deriving from them, from acknowledged motives of expediency, two separate standards for criminal and civil applications.

The theory that insanity was a question exclusively of fact, and therefore a matter for the jury to determine, was announced in *State* v. *Pike*:[2] "Whether the defendant had a mental disease, and whether the killing of his wife was a product of such disease, are questions of fact for the jury."

"Insanity is a mental disease; a disease of the mind. An act produced by mental disease is not a crime."

Wharton's objection to this proposition is that "mental disease" included every phase of human passion, but he appears to have overlooked the fact that the opinion was restricted to insanity, which is merely a form of mental disease. He further states that "the question in criminal issues is not insanity, but irresponsibility, which it is eminently important should be limited by positive definition by the highest judicial authority the

[1] 1 Whart. & S. Med. Jurisp. § 108.

[2] 49 N. H. 399, 6 Am. Rep. 533.

state can constitute; and that experts do not form such an authority because their sense as a body cannot be obtained by any process known to our courts, because there is no independent court of experts, which, on notice to both sides and after argument if necessary, can, when the experts called in a particular case differ, give a judicial opinion upon the issue; and because, in many cases of criminal defense, only those eccentric and exceptional experts are selected who believe in some wild theory which may help out the defendant's case." [1]

The same reasoning may apply to any earthly question, and, given equal intelligence, better opportunity, and special training in all that relates to a given subject, the profound study of that subject should qualify the student to pass upon all that pertains to it more intelligently than the one who is not so qualified. Dishonesty and wild theory are not the exclusive possession of any one class or profession, and if, as Judge Wharton states, lawyers seek such theorists and eccentric experts, the fault is elsewhere than with those who honestly struggle to master and present the facts in such a special field of human knowledge. Where could worse logic and wilder theory be found than in the parliamentary and judicial conference of 1843?

Nor has there been any agreement among jurists as to what constitutes insanity. Mere consensus of opinion need not be regarded as establishing more than a temporary agreement, which may or may not be consistent with actualities. The disagreements of doctors originally had reference to doctors of divinity, and the failure of all physicians to think alike is no worse than the differences to be found among the judges and members of the bar on vital questions.

No human intellect can pass upon criminal responsibility otherwise than arbitrarily, whether as legislator, judge, juror, or physician, unless in possession of sufficient information upon which to base an opinion. The physician may not be aware of, nor regard, the legal consequences that may flow from asserting the irresponsibility of some lunatic who is foredoomed by the lynching spirit; but with vastly better opportunities for the study of the phenomena of disease, and less likely to be hampered by tradition, the physician who as such has made a special study of insanity,

1 Whart. & S. Med. Jurisp. §§ 112 *et seq.*

is plainly in a position to make deductions from the mental states of disease, which all others would appreciate properly were they to enjoy similar opportunities.

When an alienist can describe, fully and accurately, the course of a malady of any sort, it is no uncommon thing for his auditors to agree with his views. It is not generally known that a typhoid fever patient may become dangerous to himself and others, in a sudden attack of delirium. A thorough knowledge of all that pertains to typhoid conditions, the causes, duration, treatment, prospects for recovery, and the mental peculiarities of that disease, furnishes a basis for an opinion as to the responsibility of the patient for any offense committed. Insanity is not a disease, it is merely an effect of disease, it is symptomatical; and an unprovoked attack should certainly be considered from the standpoint of sickness existing at the time, the particular kind of sickness, and the characteristics of such ailment, especially as bearing upon what those similarly afflicted have done. The responsibility for an act performed in a typhoid fever delirium involves questions as to the entire disease, and cannot be intelligently separated from such complete knowledge. It is not possible with insufficient *data* to arrive at adequate conclusions upon any topic; therefore, while the alienist can instruct judge, jury, or legislators, as to peculiarities of mental diseases so that intelligent laws may be framed and administered, the source of the requisite knowledge should be remembered.

In so far as others acquire information enabling them to have competent opinions, they have, to that extent, become experts themselves.

The old English rule that insane persons could not be put upon trial or convicted has been affirmed very generally throughout the United States, but is occasionally interpreted as imposing upon the defendant the affirmative of the issue and giving him the right to begin and conclude to the jury. Sometimes this preliminary trial of the insanity issue is held, as not a matter of right belonging to the accused, but as within the discretion of the court. In Wisconsin trials I observed that where the insanity inquest preceded the trial for the crime, the defendant was placed at a disadvantage, because much of the testimony going to prove the crime was thus introduced, for the first time, to the prosecut-

ing attorney. In short, in proving the insanity the crime was also proved by the witness for the defense.

An English decision[1] provides that counsel defending a prisoner may set up in his behalf the defense of insanity, although the prisoner objects to the plea and strenuously asserts that he is not insane.

Paranoiacs on trial for murder are frequently opposed to insanity being pleaded for them, and in both the Guiteau and Prendergast trials the prisoners constantly interrupted the proceedings with comments, disclaimers, and abuse. In the case just cited the prisoner was also allowed to suggest questions to be put by his lordship to the witnesses for the prosecution to negative the supposition that he was insane, and was also allowed to call additional witnesses on his behalf for the same purpose. The freedom from control of counsel by the prisoner was held in *State* v. *Patten*.[2]

The law as to persons who become insane after committing a criminal act is stated by Hale:[3] "If a man in his sound memory commits a capital offense, and before arraignment for it becomes mad, he ought not to be arraigned, because he cannot advisedly plead to the indictment; and if such person after his plea and before his trial becomes of nonsane memory he shall not be tried; or if after his trial he becomes insane he shall not receive judgment; and if he lose his senses after judgment he shall not be executed, for were he of sound memory he might allege somewhat in stay of judgment and execution."

In *Com.* v. *Braley*,[4] a prisoner was indicted for the murder of his wife. He had also soon after cut his throat in a manner that endangered life. He pleaded guilty, but stated that he did not know what he had done. A jury was sworn to find "whether he neglected or refused to plead to the indictment against him for murder, of his free will and malice, or whether he did so neglect by the act of God." The jury found that he did so neglect by the act of God, and the prisoner was remanded to jail.

In *Freeman* v. *People*,[5] the New York supreme court held

[1] Reg. v. Pearce (1840) 9 Car. & P. 667.

[2] 10 La. Ann. 299, 63 Am. Dec. 594.

[3] Pleas of the Crown, 35.

[4] 1 Mass. 103.

[5] 4 Denio, 9, 47 Am. Dec. 216.

that while a person continues insane he cannot be tried or punished.

In the same case it was held to be error where, on the trial of an indictment for murder, the court refused to permit evidence to be given that the prisoner was insane at any time after the finding of the verdict on the preliminary issue of insanity at the trial.

And where the prisoner was tried for murder four months after the crime was committed, evidence that he was insane at the time of the trial was relevant on the question of his sanity four months before.[1]

Insanity after verdict or judgment. If the person after conviction of a capital felony suggests insanity, the judgment must be suspended until the fact can be tried by a jury; if after judgment, execution must be likewise stayed.[2]

In an inquisition to inquire into the sanity of a man convicted of murder and sentenced to be hanged, but who, it is claimed, has since become insane, evidence of his insanity before conviction is inadmissible, except when such insane acts are explanatory of insane acts since conviction.[3]

The day before the execution of the anarchists in Chicago, in 1886, the question of insanity of one of the condemned, Louis Lingg, was raised, and he was to be brought before the county court on an inquest. The state's attorney asked my opinion as to whether Lingg had become insane since the trial. As I had sufficient reason to believe that he had always been insane I stated my intention of testifying that if the judicial proceedings had established the sanity of the prisoner so that he could not have been regarded as insane previous to the trial, and at the same time Lingg was now a demonstrable lunatic, the inference was inevitable that Lingg must therefore have become insane since the trial, though in my opinion his previous insanity had been overlooked. An hour before the time set for the insanity inquest Lingg blew his head to pieces with a cartridge.[4]

Homicide. Burdraghi, since 1889, has been accredited and quoted by numerous European and American medical journals

[1] Ibid.

[2] State v. Vann (1881) 84 N. C. 722; State v. Brinyea (1843) 5 Ala. 241.

[3] Spann v. State (1873) 47 Ga. 549.

[4] For further citations and legal discussion on this subject, see chap. VII.

with the following analysis of one hundred cases of homicide committed by the insane:

The great majority were cases of delusions of persecution; eighteen were epileptics; two were instances of transitory frenzy; one was cannibalistic.

Fifty-eight of the insane killed relatives, and forty-two killed strangers.

The youngest murderer was four years old, a girl, who threw into the fire an infant she had been left to attend; the oldest was seventy years of age; thirty were between thirty and forty years old.

Seventy-five were men; twenty-five women.

Seventeen were quite illiterate, and sixty-one were poorly educated.

Religious delusions were present in twelve, and in five of these were the immediate motive of the crime; twenty-five were hallucinated, and fourteen had been previously insane. Fifteen had killed two or more persons, one individual having murdered no less than eleven. In nineteen no motive could be assigned.

That even excessive joy may destroy the reason is shown by the case of a man who unexpectedly came into a fortune of $10,000,000 and killed his wife and children.

In fourteen the act was premeditated, and in these and another case considerable ingenuity was shown in the carrying out of the homicides.

Twenty-seven sought concealment in flight, but all sooner or later returned.

Three attempted to prove alibis.

Twenty-three prevaricated, but of these twelve had lost all recollection of their acts; sixty-seven remembered them, but in fourteen cases they were committed under the influence of hallucinations; fourteen others, though knowing what they had done, were of weak intellect, and one was a case of transitory frenzy. (This latter instance needs explanation, as memory of events immediately preceding the murder, with what he had been told that he had done, might be the means by which he "knew what he had done.")

Fifty-four were remorseful, more or less; but of these forty-six failed to realize the enormity of their crimes; seven gloried

in them; twenty-three attempted to exculpate themselves; thirteen, undoubtedly of weak intellect, simulated insanity; eleven of these were subsequently transferred from the asylum to the jail, and six in all succeeded in escaping from the asylum.

Seventy-eight were acquitted of responsibility on the ground of insanity; fifteen were pronounced to be partially accountable for their acts (under German verdicts), and sentenced to various periods of imprisonment; while eight were found guilty of murder.

Homicides are committed by many kinds of insane.

Imbeciles and idiots are sometimes capable of remorseless destruction of their victims in a great variety of ways, as by butchery, poisoning, hanging, burning, drowning, etc.

Alcoholic insane states are responsible for innumerable homicides; wife murder, often of the most savage nature, is conspicuous among these.

After head injuries the homicidal disposition is frequently developed when insanity is the result of such traumatism; and alcoholism is too often conjoined with such insanity, sometimes to an extent that renders it difficult to determine how far intoxication or the head injury may be the greater factor in the insanity.

Paranoiacs are the most numerous assailants of prominent persons, such as kings, presidents, governors, mayors, and notables generally. Under delusions of persecution these degenerates single out heads of governments to adjust what they consider to be public wrongs, and occasionally seek similar insane redress of imaginary or real private wrongs.

Senile dements are liable to kill others only during their maniacal outbursts, as when they fancy themselves surrounded by burglars, or that their friends are strangers trying to do them bodily harm.

At puberty homicidal acts similar to those committed by imbeciles may occur. Climacteric aggressive impulses may result in the death of the one attacked, or a delusion may originate the homicidal propensity at this period in women.

Transitory frenzy may result in murder, but most often without premeditation, and the victim is the nearest bystander. It is

conceivable that a prejudice may have existed previously, arousing the suspicion of design; but while the despised person may be the one killed, because nearest at the time of the frenzy, any other person would have been as likely to be slain under the circumstances. Preparation, prearrangement, or deliberate planning and execution of acts, necessitating traveling, purchase of weapons, etc., in connection with motive for killing, are incompatible with transitory frenzy. Emotional and moral insanities are terms that were formerly used to designate insane states in which homicides were committed, but such insanities are now no longer recognized either in law or medicine.

Delirium might occasion the death of one who restrained a furious case of the kind, and delirium tremens, even after a single debauch, might similarly result in homicide of a bystander. Premeditation would be out of the question in such instances, except where, as in transitory frenzy, an enemy happened to be present at the time.

Homicide committed by one suffering with simple mania is more likely to be unintentional than designed, in the greater number of instances. The changeableness of maniacal fancies would prevent deliberation, but it is to be remembered that maniacs cherish dislikes, and upon an opportunity presented may avenge themselves.

Melancholiacs are more apt to be suicidal, but during their frenzies of terror, when the universe is changed in appearance to them, they have killed their dearest friends. They may also entertain dislikes, and an attack of fury may be brought on by the presence of a hated person.

During puerperal insanity infanticide is common, and particularly in the transitory frenzy of betrayed women during childbirth.

Epilepsy is, at times, particularly homicidal. Revolting and motiveless crimes have been committed in the insane and unconscious states of this disease, and epileptics are capable of both planned and premeditated crimes of which no recollection may be preserved. Undoubtedly many mysterious murders have been perpetrated by epileptics that were not known even to the perpetrators. Dr. Forbes Winslow predicted years before the capture of "Jack the Ripper" that the murders would be traceable

to some form of periodical homicidal insanity, and the London physician who was finally found to be the guilty person appears to have experienced the "double consciousness" states that characterize epilepsy in some of its forms.

Indifference or absence of remorse is generally, but not invariably, characteristic of epileptic criminality.

Many murders that would otherwise be unaccountable could probably be explained as products of unsuspected epileptic conditions; the perpetrator knowing nothing of what had occurred, or recollecting hallucinations and giving details that are found to be untrue.

A paretic demented is liable to make murderous assaults at times, in epileptic-like and maniacal furies, but not assaults of the deliberate, planned variety, for such dangerous periods are too transient in paretic dementia.

Hysterical insanity is capable of murder through delusions associated with jealousy, or otherwise.

Katatoniacs and other periodically insane, during either melancholic or maniacal accesses, may be guilty of homicide; the former especially when complicated with alcoholism.

Homicidal insanity as a distinct clinical entity which is characterized by the impulse to murder, and without other recognized symptoms, is no longer admitted either legally or medically. Homicidal inclinations are found among the symptoms of almost any kind of insanity, but the impulse to murder never constitutes, by itself, a morbid condition separable from all other symptoms. The only remaining excuse for the preservation of such a term as homicidal insanity is found in a class of degenerates entitled by Regis "cerebral neurasthenics," or those who suffer from impulsive obsessions or morbid propensities; but the associated symptoms should enable the alienist to recognize such persons apart from such dangerous impulses.

Paul Garnier[1] defines the variety of impulse sometimes called homicidal monomania as a syndrome (collection of symptoms) "directly connected with hereditary moral degeneration, and essentially characterized by the desire to murder, without any intellectual disorder or passion, and necessarily requiring, as concomitant mental conditions, persistence of consciousness, anxious

[1] Folie à Paris, 1890.

struggle against the besetting impulse, and lastly, in case the act is committed, subsequent moral depression."

In this homicidal impulse the intellect is clear aside from the murderous propensity, which is repressed, as far as possible, with anguish. When the antecedents of the assailant are not fully known, the attempt or act causes surprise, on account of the absence of passion or motive and the preservation of intelligence, consciousness, and memory. The reason and volition strive against the impulse, and are overcome by its hideous persistence.

The attack may be suddenly made by the obsessed person, though the inclination may have lasted some time, or have been suddenly aroused. The obsession may amount to what the patient fears may be an uncontrollable one, or it may be so violent as to be actually beyond control.

The premonitions of such periods are stated by Garnier and others to consist of "a sudden sense of heat in the head, constrictive headache, painful anxiety located apparently about the heart, shivering, etc." Esquirol in the early part of the nineteenth century noted the following:

"When the individuals who are governed by impulse to murder are carefully observed, one finds that this condition is preceded and accompanied by headache, sickness, and abdominal pains, such as often occur in the insane, and that these symptoms are more pronounced when the dreadful impulse becomes more powerful."

The patient has usually confided a statement of his struggles, sensations, and fears to one or more persons, usually his physician or his family; sometimes he seeks legal control against his propensities, as in the instance narrated in another part of this book. Garnier claims that their language is characteristic in describing their apprehensions. They use such expressions as, "I have bad thoughts. . . . I am tormented by the fear of doing evil to those who are dearer to me than any in this world. . . . An inexplicable instinct drives me to do the most frightful crimes. . . . I must fly to avoid succumbing to this impulse," etc. Their expression is most anxious. Many readily forego their liberty until the period is passed. The destructive impulse may be powerfully excited by the sight of instruments convertible into weapons, by favorable opportunities, and other suggestions.

The victims may be strangers or members of his own family, often his children, and his most loved ones. The majority deplore the propensity and seek some means of restraint, while a few conceal it. Remorse almost invariably follows the accomplishment of the act. The obsession to murder may be of slow, intermittent courses, and with exacerbations of the desire, which may be more or less fixed; or the impulse may appear suddenly like an epileptic explosion; but the consciousness is preserved, as it is not in epileptic phenomena, as a rule.

The hereditary or other predispositions of such degenerates are generally quite marked, and should be studied in establishing the fact of the uncontrollable impulse.

This degenerate impulse might be mistaken for an epileptic act, or one committed in consequence of mandatory hallucinations of hearing. The history of the case should sufficiently distinguish them.

The insanity of uncontrollable impulse produced by mental disease is recognized as a defense in *Com.* v. *Rogers*, 7 Met. 500, 41 Am. Dec. 458; *Anderson* v. *State*, 43 Conn. 514, 21 Am. Rep. 669; *Com.* v. *Mosler*, 4 Pa. 267; *People* v. *Sprague*, 2 Park. Crim. Cas. 43; *Scott* v. *Com.* 4 Met. (Ky.) 227, 83 Am. Dec. 461; *Kriel* v. *Com.* 5 Bush, 365; *Shannahan* v. *Com.* 8 Bush, 464, 8 Am. Rep. 465; *Stevens* v. *State*, 31 Ind. 485, 99 Am. Dec. 634; *State* v. *Felter*, 25 Iowa, 67.[1]

In cases of infanticide Savage remarks that "the law itself rightly, in this particular, looks upon the crime itself as sufficient evidence of the insanity; that a loving mother should destroy her offspring is unnatural and unreasonable, and ought not to be considered as an act for which she can be held responsible." Under *Head Injury*, another quotation is made from the same alienist concerning the act itself as often pointing to its insane origin. In paranoiac murders, such as those of Guiteau and Prendergast, the absurdity of their justifications should attract attention. These degenerates speak as though the universe depended upon them for control; governments, religion, everything, or some particular or general welfare, has been divinely intrusted to their care, and in their watchfulness over such mat-

[1] For further citations and discussion of this subject, see chap. VII., II., §§ 6, 7.

ters it appears to them necessary to remove some offensive individual who is powerful enough to run counter to their plans for universal good.

The fact that insane criminals have escaped from asylums, or that they have secured release on habeas corpus proceedings, alleging recovery, properly or improperly, induces juries, occasionally, to visit capital punishment or penitentiary conviction upon offenders whose sanity they have reason to doubt. Juries should be advised against usurpation of legislative or judicial functions in adjusting or construing laws to suit fancied contingencies, in clear violation of their oaths.

Sexual crimes are occasionally closely associated with insane and other murders, as in the notorious Whitechapel murders of "Jack the Ripper;" and a California instance of the murder of two young girls in a church by a young medical student who was said to have had epileptic attacks; but as this was not brought out in his defense it is improbable that he was an epileptic.

A negro epileptic ravished a white girl and butchered her horribly, leaving the mutilated corpse in a sack but indifferently secreted. After his execution his brother, who was not known to be an epileptic, was arrested in an attempted outrage on a white female. The first-mentioned occurrence was in Chicago, and the last in Evanston, Illinois.

Occasionally a patient, usually of the degenerate order, is committed to an asylum for the offense of pæderasty, sodomy, and for other unnatural crimes. The officials at such institutions are placed in a quandary regarding such commitments, as the offensive charges indicate the unfitness of the accused to be allowed to mingle with other patients, and the probabilities are that the not very well-defined insanity in such culprits is of a chronic nature and renders it difficult to appropriately classify them with other cases as to domicil and oversight.

Erotomania, as illy controlled sexual impulses are called, afflict many different kinds of insane persons, and the most dangerous of these are epileptics and senile dements; the latter are inclined to entice young girls as well as to make foolish marriages. Cases of circular insanity are sexually exalted, and are apt to commit sexual offenses.

The matter of sexual perversion is fully discussed by Krafft-

Ebing.[1] A young woman was temporarily confined at the Elgin asylum for sexual intimacy with another of her sex, and detectives are occasionally employed in effecting separation of such offenders by threats of punishment. A Memphis, Tennessee, instance came to trial, wherein the female sexual pervert shot and killed the girl with whom she associated, in a fit of jealous rage. Some of these characters are manifestly insane, others appear to have acquired bestial habits through circumstances, while otherwise seeming to be sane, as far as the reversion to savagery and the development of perverted and brute instincts can be so regarded. The Elgin female contracted an intimacy with a female attendant at the asylum and after liberation shot and killed the attendant in jealous rage.

Larceny or kleptomania may be consciously or unconsciously committed in nearly every variety of insanity. Epileptics may appropriate property, openly or secretly, without responsibility or recollection of so doing. Senile dements mistake the effects of others for their own. Paretic dements often commit stupid thefts, and may even steal their own property. It is unfortunate that many such cases have been apprehended and imprisoned for the crime without recognition of their insanity. When the disease becomes far advanced in the penitentiary, they are too often considered as having become insane after incarceration. Imbeciles are frequently adroit thieves. At the climacteric kleptomania sometimes appears. Alcoholism can so degrade the intellect as to make both criminal and insane thieves. The morphine and opium eater steals only to enable him to procure his poison. Paranoiacs, such as the noted book thief, Otto Funk, may take the property of others as their right, while realizing the necessity for secrecy, knowing that the public does not recognize their imaginary claims or justifications. Circular insanity during the maniacal stages is usually associated with a decidedly thievish and fraudulent disposition.

Puberty or pregnancy may be attended with impulses to steal; and there is no doubt that this intensification of an inheritance from our primitive ancestry may be the sole manifestation of the degeneracy in the "cerebral neurasthenic," such as Regis describes. A respectable and renowned New York physician is

[1] Psychopathia Sexualis, Translation by Chaddock, 1892.

widely known to be unable to resist an opportunity to pocket the instruments of his medical and surgical friends. In alleged kleptomania cases the history of the accused and that of his or her ancestry should be thoroughly investigated as to physical and mental diseases.

Arson may be committed by alcoholics, imbeciles, paranoiacs, maniacs, melancholiacs, epileptics, paretic dements, at puberty and during the insanity of adolescence, or even by terminal dements. There is no obsession propensity apart from insanity that would enable an otherwise sane person to plead an irresistible impulse to burn property. (See *Pyromania* in the chapter on *Degeneracy*.)

Forgery has been committed by paranoiacs, usually by passing checks, more often than in any very elaborate way. There could be a lively discussion as to whether some instinctive criminals do not border closely upon moral imbecility in their capabilities for crime in general and in some instances of forgery. That theory might assist to explain why some incorrigible sons forge their fathers' names, even with the danger of ruining the family fortunes, and the culprits' own prospects also.

Assaults are prompted in the insane by the same influences that lead to homicides, with the difference between the sane and insane assault that murder is more likely to be the intent or outcome of insane attacks.

False accusations. Many insane after recovery may be unable to distinguish accurately what was purely subjective, in the course of their disease, from objective experiences; and their hallucinations, illusions, or delusions may lead to mistakes as to persons and events connected with their insane periods. Owing to this, officials of asylums, attendants, and others have been wrongfully charged, although many things the insane tell as to what happened before they recovered may be perfectly true; but the liability to false memories should be recognized as common after recovery.

During the height of the disorder many insane accuse, not only themselves, but others also, of all sorts of possible and impossible offenses, and often with a plausibility that is difficult to detect.

Wrong inferences can easily be made, also, as what a patient may have done, or how others may have behaved towards the in-

sane person. For instance, a maniacal lady talked incessantly for awhile about a gentleman whom she had casually met but once, and what she said easily led others, who were unaware of the truth, to think that the person she mentioned was responsible for serious contributions to her sickness. A melancholiac lady also claimed that she had been seduced, and her family was only deterred from rash acts against the suspected seducer by her recovery and repudiation of her accusations as insane, without any grounds in fact. Mental hysterical and pubescent cases, climacteric patients, the circular insane, and imbeciles, make false charges, and the first named is particularly libelous and inclined to stir up scandal by anonymous letter writing and other means, even to the extent of forfeiting life itself in furtherance of such designs.

False confessions are made by some insane persons through similar motives, or, at times, without apparent motive. Melancholiacs seem to prefer self-condemnation, and falsely accuse themselves of being sexually indiscriminate and otherwise culpable. A melancholic lady calmly confessed to receiving a male friend nightly in her room; and her story was believed against protests and explanations to her family and priest. Upon recovery she was disgusted with them for having listened to her "foolishness."

Haslam,[1] even in his early period, narrates cases of false confessions to murders when no murder had been committed.

Hammond[2] mentions that the desire for notoriety leads sane hysterical patients to make false confessions; and Legrand du Saulle[3] had previously discussed this propensity of the hysterical.

Malicious mischief, or criminal prankishness, may be traced to numerous kinds of insane persons, such as the circular insane cases, hysterical, maniacal, etc.,—in fact nearly every variety; but imbeciles and the hysterical insane are most apt to be guilty of complicated, annoying, and even dangerous and destructive malicious mischief, sometimes of a revolting kind.

Motive in crime. Crimes without motive are particularly characteristic of some insane, but many irresponsible patients are quite as able to concoct elaborately planned, deliberate, premedi-

[1] Medical Jurisprudence as it Relates to Insanity, 1817.
[2] Treatise on Insanity.
[3] Les Histériques.

tated, designed, and ingeniously contrived crimes of almost all kinds.

Ray[4] says in this connection: "What must be thought of the attainments of those learned authorities in the study of madness, who see in the power of systematic design a disproof of the existence of insanity, when from the humblest menial in the service of a lunatic asylum they might have heard of the ingenuity of contrivance and adroitness of execution that often characterize the plans of the insane. If the mind continues rational on some subjects it is no more than what might be expected that this rationality should embrace the power of design; since a person could not properly be called rational on any point in regard to which he had lost his customary ability to form his plans and designs for the future. These views are abundantly confirmed by every day's observation. The sentiment of cunning, too, which is necessary to the successful execution of one's projects, holds but a low place in the scale of the mental faculties, being a merely animal instinct, and is oftentimes observed to be rendered more active by insanity, so as to require the utmost vigilance to detect and defeat its wiles. One who is not practically acquainted with the habits of the insane can scarcely conceive of the cunning which they will practice when bent on accomplishing a favorite object."

Instigation to crime is common among criminals, and any designing, unscrupulous person would be apt to avail himself of defective intelligence in others to carry out his plans. In civil cases undue influence is paralleled by instigation to crime. Imbeciles, or even idiots, are liable to the control of evil persons, and the acts of a paranoiac may be directed or diverted to certain crimes by the prompting of others. An insane degenerate was arrested in 1896 in an endeavor to carry out the directions of a clairvoyant who had suggested the murder of Mr. Pullman, of Chicago. Multitudes of defectives are controlled by more intelligent knaves, and a modern phase of criminal influence appears connected with hypnotism.

Hypnotism. The "grain of truth" is often hidden in immeasurable quantities of the chaff of credulity, superstition, fraud, and chicanery. The Röntgen process of skiagraphy consists of

[4] Op. cit. 33.

an electro-chemical influence able to penetrate some substances and not passing through others; it is somewhat analogous to magnetism, which is not interrupted by some interposed materials. Yet in spite of the simplicity of the phenomena to anyone with a rudimentary knowledge of physics, the popular conceptions of the matter are absurd, and mountebanks make the most extravagant claims of even supernatural discoveries based upon skiagraphy. In the same way the Indian medicine-man has imposed upon his fellow savages with mirrors and seidlitz powders, because they are unfamiliar with such things; informing them that their souls are pictured in the looking-glass, and that water can be made to boil without heat, by means of the effervescing substance.

Divesting the subject of hypnotism of the verbiage of its literature we find that from unknown periods, in India and Egypt and elsewhere, there were persons who professed to be able to influence others in mysterious ways allied to those more recently practised under the names of "mesmerism," "animal magnetism," "hypnotism," and "mental suggestion."

In 1815 Abbe Faria, in Paris, showed that Mesmer's process depended upon the subjects, and had no reference to any mysterious power of another; and in 1841 Dr. Braid, of Manchester, England, studied La Fontaine's experiments with the same result. Later the subject was investigated by Carpenter, Laycock, Simpson, and Mayo in a conscientious, scientific way, but owing to the deceptions and preposterous assertions of others the study was dropped, because of its unpopularity. A "Dr." Grimes practised what is called electro-biology in 1842, in the United States. Broca, after this, took up the investigation, and Moll used it to perform some painless operations in surgery. Liébault in 1866 published a book recommending the use of some such influences in the treatment of disease. Czermak in 1872 experimented on animals, and Richet took up the subject in 1875, followed by Charcot, who began his hypnotic clinics about 1878, and founded what is known as the Paris school of hypnotism, which claims that the state is a distinctly diseased condition and its various alleged forms are merely symptoms or phases, such as lethargy, catalepsy, and somnambulism; that hypnotism is a disease closely allied to hysteria, and peculiar to per-

sons with depressed nervous organizations; that but few, besides hysterical persons, can be hypnotized.

Following Liébault's suggestion, Bernheim and others founded what is known as "the school of Nancy," from the name of the town in France, where the matter is studied; and though it is suspected by many intelligent students that Bernheim and Liébault may be mistaken in some of their conclusions, their candor and honesty are not doubted. The Nancy school maintains that the hypnotic state is physiological and closely allied to natural sleep, which differs in degree only, and is not divisible into phases; that mental suggestion is the keynote to the entire phenomena, whether the subject suggests what shall be done to himself, or whether the suggestion is made by another; that under favorable circumstances 90 per cent of all persons may be hypnotized, and that hypnotism has some value in curing both functional and organic diseases.

There are essential points of difference between these two French schools. They disagree as to whether the hypnotic is a diseased or a healthy state; the phases of one school are regarded as mere degrees by the other; one holds to the physical and the other to the mental origin of the phenomena; the Paris school claiming that but few are susceptible, while the Nancy school asserts that nearly everyone is hypnotizable.

Considering the fact that some animals can be reduced to this unconscious condition, it is likely that a low intelligence, at least, is capable of being influenced in this way by another, and a fusion of both schools could be made on the supposition that both are partly right and partly wrong.

It would be of prime importance medico-legally, were it possible, to determine whether one person could cause another to commit a crime against his will. Degenerates, either of the criminal or the insane type, would be most easily influenced in this way. It is known that mere suggestion, through reading about a crime or suicide, has made imitators among the ill balanced; but it has not yet been proved that an innocent person could be thus influenced by another to commit crime. Therefore the presumption remains that anyone who commits a crime through hypnotism or other suggestion is fully capable of so doing without such prompting, and that the act is one consistent with his disposition,

and that the suggestion would have been resisted had the person been disinclined to the offense naturally; and the question is open as to whether such a hypnotized criminal is not a principal or at least *particeps criminis*. The opinion prevails among the more conscientious and reputable students of hypnotism, that a person cannot be induced, by mental or other suggestion, such as the hypnotic, to commit a crime against his will.

In 1895 Hayward was hanged in St. Paul, Minn., accused of having induced Blitz by hypnotic suggestion to murder Miss Ging. Blitz was sent to the penitentiary for life.

Faith healers, Christian scientists, and others who impress the imagination sufficiently, occasionally effect cures of minor ailments, but all organic troubles are beyond the reach of such means of cure, as is also the loss of an eye or an amputated leg.

Hypnotism may influence some patients to anæsthesia, so that surgical operations can be performed without pain, but certainly such possibilities are rare, or it would come into more general use.

There is a division of opinion as to the harmfulness of hypnotism. It is probable that it harms some, and does not so affect others. At any rate there is enough danger to make considerable caution necessary, particularly as to repetitions.

A newspaper suggested that a prisoner might exculpate himself by claiming that he had been hypnotized by one who had also been hypnotized to do the hypnotizing.

Prof. Jos. Jastrow, in a popular science article, remarked that "the possibilities of deception are so many and various that an extensive technical knowledge of the methods of conjurers and of the psychology of belief is indispensable to the right of opinion, which too often is regarded as a natural prerogative."

Medical evidence. Attorneys select experts to assist them in presenting their theories as favorably as possible. Occasionally a judge appoints an expert, usually by agreement of the contending parties. Bias is unavoidable, and, indeed, it is expected, when one side employs the expert; but the extent of the bias will depend upon the personal character of the expert. Some are too conscientious to assist attorneys against their convictions, and such will refuse their services, at times, under any consideration; while others, irrespective of knowledge or ignorance, pride themselves on their "practicality" in this money-

making world, and will espouse any sort of a cause for the sake of a fee. It has been suggested that there should be a board of experts in insanity appointed by the governor, or other political official; that the court should always select the expert, and Judge Hornblower thought that experts should be created by the supreme court; and various other remedies for the existing evils of the present system have been urged by people little accustomed to study sociological matters in the light of facts. Considering the haphazard manner in which the average person selects his family physician, and the notorious financial success of advertising charlatans, neither politicians nor the judiciary are any more likely to escape imposition by pretense than is the populace. Such methods of selection would insure additions to the office-seeking hordes, and foster intriguery for place, which invariably foists the incapable and dishonest into positions ostensibly created for the capable and conscientious. Such "reforms" are as sapient as the proposition, made in all seriousness, that the legislature should (in violation of our constitutional provision against sumptuary laws) prescribe uniforms that would enable the people to distinguish first, second, and third class physicians. The rankest and most blatant ignoramus would soon be parading in gold lace, while the learned and modest medical man would be in sackcloth. Not that the judges would knowingly select incompetent or otherwise improper experts, but events prove that, however willing the judge may be to select a suitable medical examiner, his opportunities and leisure for exercising judgment in such matters are no better than those of others.

Conditions in one country might make practicable what would fail miserably if attempted in another. For instance, in some of the older countries in Europe reputation for special learning is apt to be bestowed where it is deserved; the settled conditions in such places admit of a keener discrimination in this respect; but in America, with its kaleidoscopic changes and sudden formation of fresh centers of learning, its fiery competition, and general "newness," many a gifted and able person is far less widely known and respected than is the energetic politician whose methods to secure an undeserved reputation require so much undivided attention as to preclude the possibility of research, study, or anything but the most superficial acquirements in other than fields of intriguery.

While the prevalent custom of allowing lawyers to select their own experts is objectionable in some respects, a change would introduce worse evils not anticipated.

Eventually an improved process will be evolved, when the conditions render it possible; and there appears to be nothing better than to interpose no new scheme in the way of its development.

A judge of the Federal court of Chicago made some caustic statements, upon which a newspaper thus comments:

"Judge Grosscup's remarks on expert testimony will strike many persons as containing, unfortunately, altogether too much truth, though there was no need of his limiting the application to Chicago. The same thing is true in other places. Judge Grosscup said:

"'Expert testimony in Chicago is largely on the market, and I have come to regard it with very little favor unless I know the competency and integrity of the witnesses and their disinterestedness in the case in which they testify.' Of course there may be honest difference of opinion among experts. But, unquestionably, a great deal of the expert testimony which is brought to the attention of the public looks as if it might have been purchased to fit the particular needs of a case, like the services of an attorney."

The keynote of the situation is suggested in knowing "the competency and integrity of the witnesses." Lawyers should qualify themselves to expose incompetency and want of integrity, and make it part of their duty to their clients to seek the best means of doing so. No one should be allowed to impose upon the jury false appearances of proficiency; as, when surgeons testify in insanity cases, or when general practitioners attempt to diagnosticate the intricacies of eye and ear diseases, or pass upon indications of insanity, which they have had no opportunity to study. Certainly it would be proper to inquire how the medical witness had secured the requisite knowledge claimed, the amount of time this occupied, and the circumstances under which the information was secured, that would entitle his opinion to respect.

Books of science are not admissible on the ground that the author cannot be cross-examined, unless serving as a witness; but it would be eminently proper to ask the expert what books

he had read upon the subject under discussion, and this would open up a means of cross-examining him upon his knowledge of such writings.

Among what may properly be called tricks of the counsel is the endeavor to pin the witness down to categorical answers. Often a mere yes or no to questions needs qualifying, and the witness has the right to express his opinion in his own way. In this attempt to be understood he will be sustained by the court, who will respect an expert all the more for cautious and thoughtful replies, when such are necessary. A witness was once challenged to ask a question that could not be answered "yes" or "no." "Are you beating your wife yet?"—was promptly offered for experiment.

The court and lawyers do not lose dignity by claiming time for preparation, and it should be understood that an expert may not be ready to make responses at once to all questions, many of which are intended as traps to embarrass and discredit the witness. So, a question should not be answered until it is understood. The use of technical terms should be avoided, and where unavoidable the term should be explained. Some physicians are great sinners in the excessive use of technicalities; a break is the "solution of continuity;" everything mental is "psychic;" insanity is a "psychosis," and tying becomes "ligation," etc. It can be laid down as a fair rule that the more one knows the easier it becomes for him to explain himself in simple language. But, at times, it is impossible to do this, for a technical expression may embody what an education is required to understand. The sailor names his ropes, and every profession, including that of law, has special terms which can sometimes be dispensed with or explained, but many times must be retained. In addition to demanding simple language at times when technical terms are indispensable, the lawyer will insist upon "common sense" views of things of which uneducated "common sense" can form no conception. How would the lawyer or the court regard the "common sense" views of an ignorant juryman on some involved legal question? "Common sense" verdicts are often wonderful conceptions of justice and law.

A symptom may be mentioned, and the attorney will ask if that constitutes insanity; in this way every symptom, one by

one, can be excluded as not necessary to insanity. It is the syndrome, or group of symptoms—the entire evidence—that permits a diagnosis; for single symptoms may be absent, or the same symptom may be present in many diseases. Thus, cough does not constitute consumption, yet, with other things, it is symptomatic of that disease. The best reply is that, taken in connection with other symptoms, the matter mentioned would indicate insanity. Sanity, by this exuviating process, can also be as readily disproved; for there is no one characteristic that, taken by itself, is proof of mental soundness.

Avoidance of the bogs of definitions has been already advised in an earlier chapter. Never get into a metaphysical discussion with the court or counsel is ancient and good advice.

Experts are asked if crime and insanity are not identical, and if all men are not insane in some way. It is fair to retort that standards of such things vary according to the point of view, but from legal as well as medical standpoints all men are not insane, nor are crime and insanity the same. Such considerations are as metaphysical as that nothing exists in reality, everything is subjective, etc. There is a borderland in such matters which is very debatable ground, but as there is no hope of present settlement of the disputed points involved, it is well to avoid useless argument concerning them, irrelevant to the matter on trial.

The utmost candor in statements will secure respect for a witness and his opinions, where concealment and adroit answers are most apt to be unserviceable and produce contempt and discredit the value of the testimony. It is difficult for some lawyers to comprehend this simple psychological fact, and medical witnesses have been accused, by attorneys who employ them, of doing harm to their side by admitting certain facts which it would be dishonest to deny. Such acknowledgments increase the respect of the court and jury for what the expert has to say on the main questions, and an honest side cannot be better served than by frankness of its witnesses.

Hypothetical case. It was formerly the custom to ask the expert opinions based on the entire evidence, but as it was claimed that this practically put the witness in the place of the jury, the method of hypothetical questioning was adopted. This is one of the few instances where an old method was the better one.

A vastly more intelligent opinion can be formed by knowing all there is to know about any matter, than through culling and coloring evidence by means of the hypothetical question. Jurists are generally agreed as to its unfairness, especially as it presents but one side of the case.

It would be well to append to every such mode of eliciting expert opinion the further statement, when practicable: "And taking into consideration your personal examination of the individual in contest." If objection is made to this as confusing the hypothetical with the real issue, then the results of the physician's examination in evidence could be written, and be made a part of the hypothetical case.

Responsibility. Edw. M. Hyzer,[1] of the Janesville, Wisconsin, bar, states that, "as civilization advances general rules become primarily and comparatively of less importance, and greater attention is given to particular instances. The inductive method of reasoning has led to more careful investigations, definitions, and classifications of particular facts. This method has led us to particularize, and has taught the importance of the smallest fact. Facts have become dignified, and we have come to respect and appreciate their great importance in the determination of all questions.

"In the infancy of government general rules were thought sufficiently just to be applicable to all instances, but all acts were measured by them without reference to the peculiarities of facts in individual cases. Rights of persons were considered justly determined by a reference to the governmental generalizations of which only early society was capable.

"But as we advance, the tendency is to approach more nearly to individual justice and individuals; as we come to divide, define, and classify like facts, they assume a greater importance. The smallest right is assuming its proper dignity, and the slightest differences in cases which come before social tribunals are gradually becoming cognizable. Society is ceasing to measure right and wrong and responsibility by magnificent generalities; and its tendency, its effort, is, or is coming to be, to do justice according to the facts before it. 'Sanity and insanity are to be

[1] Medico-Legal Journal, New York, VII. 1, June, 1889. Prize essay N. Y. Medico-Legal Society, 1888.

measured by differences or changes of habit, taste, and disposition.'"

In criminal law the term "responsibility" means liability to legal punishment; and as the law holds that the insane are not responsible, the entire matter of responsibility is merged in the question: Who is, and who is not, insane?

During the middle ages, insanity was but little regarded by the law, though in Roman jurisprudence the principles were simple and plain, the insane being recognized as incapable of consent or voluntary action, and they could incur no responsibility by their own acts. The plea of insanity in England, until near the beginning of the nineteenth century, was generally unavailing, except in extreme cases. The fact of insanity may, in the law, exclude responsibility for crime, invalidate other legal acts, and place property and persons under control and restraint.

In England the recognition of irresponsibility of the insane, with a theory of limitations, was first enunciated by Hale,[1] and subsequent differences of opinion on matters pertaining to responsibility involved a consideration of the whole matter of insanity, from more or less erroneous grounds of observation. The different tests of insanity, mentioned in chapter II., *Definitions*, are closely related to responsibility, as faulty generalizations in this, as well as in other, related matters, would cause some insane persons to be considered as responsible for crimes.

Many alienists regard the question of responsibility in criminal cases as pertaining strictly to the law, and therefore unnecessary for them to consider. Griesinger[2] expresses himself on this point: "When the question of responsibility is raised it has always hitherto been a customary concession by the medical jurist to answer it. From the nature of the question, however, the physician is not obliged to give any opinion upon these wholly judicial matters, but only to furnish the judge or jury who decide these questions, with the facts fully digested relative to the case. The physician can also, if it be his interest, refuse to answer the question of responsibility; and I myself have, in a celebrated case, declared that if the question of responsibility were put to me, I would not answer it, as being extra-medical. It was accordingly

[1] Pleas of the Crown, chap. 2.

[2] Mental Pathology and Therapeutics, 34.

not put. What other questions may, then, be legitimately proposed to the physician? Evidently, in most cases, questions like the following: Whether disease exists which disturbs the mental activity generally, and specially suspends liberty of will; or, as degrees must here be admitted, whether to a greater or less extent it has limited it, or could have done so. By answering this question the physicians keep within their own sphere, and it contains all the essentials that can be learned from them. For the physician, who is a competent judge, it is impossible in the present state of science to give a definite answer to this question, and therefore he should declare it, and without respect to consequences. He has no other interest than that of truth, and therefore should not meddle with matters which do not belong to his office, and for which he is not responsible: for example, whether the law should punish those who are evidently, to some extent, insane; or what degree of punishment should be inflicted upon the accused. The judges or jury are not bound by the opinion of the medical man, which is but one element, among others, to aid them in coming at a decision. It would be fearful if the medical evidence, often so bad and contradictory, had a decisive influence upon the issue of a criminal process. It were well that physicians could see that hereby the influence of their science is limited; the more strictly they keep their own sphere, into which none can follow them, the greater will be their influence. The author speaks from forensic experience."

Sir James Crichton Browne, an eminent English alienist, in a lecture on this topic, remarks:[1] "There are some prisoners and convicts concerning whose insanity no doubt can arise, even in the minds of the laity; but there are others whose crimes, although apparently—that is, to the ordinary observer—committed whilst in full possession of will power, are yet traceable by the expert to diminution of voluntary control. If happily these latter escape with their lives, 'to be detained during Her Majesty's pleasure,' it is obvious that a complete record of their acts and demeanor during their incarceration should not only be preserved but published, in confirmation of the ground upon which they were sent to enforced confinement instead of to the gallows. If this were done, there would be less disposition than there is at

[1] London Lancet, July 28, and August 4, 1888.

present to hesitate to accept the opinion of expert medical witnesses upon the relation of insanity to crime. Whilst, however, the recorded history of so-called criminal lunatics ends with their public career, there will necessarily be a great tendency to regard with distrust the plea of irresponsibility set up in answer to a charge of wilful murder."

The Lancet editorially states: "Perhaps the most cogent remarks in Sir James Crichton Browne's lecture were those in which he attacked and demolished the tenets held by Lord Bramwell upon the most fitting jury—lay or medical—to decide upon a man's insanity. As is well known, his lordship holds the opinion that common sense is sufficient to determine the question at issue, and that there is no necessity for special expert knowledge. Nor is Lord Bramwell singular in this opinion, for not long since we had occasion to contest the common-sense ruling of one of our judges that the question of the prisoner's insanity was one for the jury, and not for the medical witness."

Whereupon Dr. C. H. Hughes comments:[1] "The 'common-sense' criterion of mental aberration is simply nonsense. 'Common sense,' unenlightened and unswayed by scientific observation and deduction, has successively ignored and controverted all the observations and discoveries of Copernicus, Galileo, Columbus, and Newton, to those of Galen, Harvey, Jenner, and Koch, until men of uncommon sense and rare powers of observation were numerous enough to come forward and confirm the uncommon idea and secure for it respectful consideration. Preconceptions are dislodged slowly from the human mind. Habits of thought that have become automatic, and formulas of precedent that have become habitual to either legal or medical authority, are grudgingly abandoned."

Some alienists have also added to the confusion concerning responsibility. Legrand du Saulle[2] admits total irresponsibility only in cases of general insanity. In cases of "partial alienation" the insane person should not be held responsible, according to this author's views, "when he has acted under the influence of the delusion, but should be so considered when the impulse under which he acted is foreign to the sphere of his maniacal conception."

[1] Alienist and Neurologist, Jan. 1889.

[2] Traité de Médecine Légale, Paris, 1886.

Falret[1] shows the fallacy of this assumption in asking: "How can it be affirmed that a given act, accomplished at a certain moment, is totally foreign to the insane conception of the individual, while another act committed at the same time must be ascribed to a morbid impulse."

The partial insanity referred to has included all forms where there appeared to be a remnant of the intellect left; the idea being that there could be complete insanity only when the entire body and mind were overwhelmed by mental disease.

In *Blakely's Will Case*,[2] a medical witness testified that in his opinion there was no such thing as partial insanity, that a man was either sane or insane. The court held that this might be true in the light of medical science, but was not true in law.

It may be a contention over mere terminology, but unfortunately the expression "partial insanity" invariably causes serious misconceptions as to responsibility. A man may be partially disabled by having an arm cut off, but to some extent he may be compensated for his deformity by increased use of the other arm. There is but one mind in the individual, and, as Krafft-Ebing claims, it must be considered as a whole, and not as made up of independent faculties.

Ray[3] notes that the practice of the English courts in regard to "partial insanity" has been regulated by no settled principles, and cites the Greenwood and other cases, with an extensive argument, on the impropriety of holding to the possibility of a "partial insanity."

An insane person may know right from wrong, as ordinarily conceived, and may have, in addition, the power to choose between acts in which conceptions of right or wrong are involved; but he may also regard himself as above the ordinary rules regulating human conduct; just as a sentinel on duty cannot feel guilty of the murder of one he has killed in the act of forcing his guard. So the paranoiac expects applause for what he considers a justified infraction of ordinary laws, and appears not to be able to understand why his act is not approved. Nor is it necessary that the insane act should be so closely related to expressed de-

[1] Dict. Enc. des Sci. Méd., III.
[2] 48 Wis. 294.
[3] Op. cit. 234.

lusions as to leave the presumption of responsibility for acts unconnected therewith; for if one is sick, at any moment additional symptoms may arise, and it is impossible to predict that a sickness may not take a new direction directly consequent upon the extension of the sickness that was previously limited. The solidarity of the mind can be compared to that of the body. Heart trouble, through insufficient circulation, can secondarily involve the lungs, liver, and kidneys, and dropsy follows upon heart, liver, or kidney disorganization. The spleen is often engorged when the liver is at fault, and a stomach disease can be secondarily caused by intestinal, liver, or brain disorder. In the "partial" sickness of dyspepsia the entire body and mind are affected, and when a single mental faculty is impaired any and all other brain workings are in jeopardy.

Chief Justice Shaw, in 1844, said:[1] "This [monomania] may operate as an excuse for criminal act . . . when the delusion is such that the person under its influence has a real and firm belief of some fact, not true in itself, but which, if it were true, would excuse his act; as, where the belief is that the party killed had immediate designs upon his life, and under that belief the insane man kills in supposed self-defense."

In *Levett's Case*,[2] it was laid down that it was sufficient defense that the mortal blow was struck by the defendant under the delusion that the deceased was a robber who had entered the house; but in the Guiteau trial[3] the charge practically intimated that desire to avenge a supposed political wrong, in the absence of an insane delusion that the Almighty had commanded him to do the act, was murder. By omitting the irrelevant parts of the last paragraph of the charge to the jury that construction is derived. Lawson[4] interprets the charge, after referring to the *Levett Case*, where the delusion that the person killed was a robber who had entered the house secured acquittal, that it would have been otherwise had the delusion been that the victim was a political opponent whom it was politic to remove; notwithstanding that in *United States* v. *Lawrence*[5] the prisoner was indicted for

[1] Com. v. Rogers, 7 Met. 500, 41 Am. Dec. 458.
[2] Cro. Car. 538.
[3] Guiteau's Case, 10 Fed. Rep. 161.
[4] 2 Criminal Defense, 324.
[5] 4 Cranch, C. C. 518 (1835).

shooting at General Jackson, the President of the United States, with a pistol with intent to kill. On the trial the fact that the prisoner was at the time under a mental delusion, supposing himself to be King of England and of the United States as an appendage to England, and that President Jackson stood in the way of his enjoyment of his rights, was proved. The jury found him not guilty, by reason of insanity, and he was remanded to jail by the court, as a person too dangerous to be at large.[1]

It is scarcely necessary to mention idiocy in reference to responsibility, though it shades off into imbecility by imperceptible gradations. Georget[2] characterized imbeciles as knowing no other incentive than the gratification of animal passion, and as restrained from evil doing by no higher sentiment than the fear of punishment. He said that he had found many examples of this class in prisons, who had been judicially decided to be rational, but whose imbecility was manifest enough to him. Ray[3] mentioned many interesting instances of imbecile murderers, and the medico-legal difficulties in the way of establishing any standard of responsibility for this class of unfortunates, whose most common propensity is to violate female chastity. He cites the case of Barclay, who was executed at Glasgow for the murder of a man for possession of a watch and three one-pound notes. Barclay knew right from wrong, but supposed the watch was alive, and that God was a "muckle horse." He knew no difference between killing an ox and a man, except that "the man could not fiddle any longer."

Young children are acquainted with a knowledge of right and wrong and they often exhibit just such propensities as imbeciles. Often the imbecile is spoken of as a child in intellect, and the mind of a child in the person of an adult could be nothing but imbecility. Children are not regarded as responsible, though often induced to avoid evil by fear of immediate punishment. Georget's characterization of imbeciles could be applied to many children.

Clouston says[4]: "At adolescence the reasoning faculty first acquires backbone, the conscience then only assumes real dominance; before then the difference between right and wrong has only

[1] For further citations on this subject, see chap. VII., II., § 3.

[2] Discussion Medico Légale sur la Folie, 140.

[3] Op. cit. 101 *et seq.*

[4] Tuke, op. cit. 367.

been known, then it is felt and acted upon. . . . The sense of right and wrong, of good and evil, is by them kindled into strength enough to guide conduct." Then the day the child is adolescent he can be considered responsible, but as such development varies within wide limits the fact of having attained puberty can only be ascertained for each person. Similarly, in the entire range of human beings no set rules can be laid down for any age, diseased state, or station in life, applicable in even a majority of cases; and individualization in such things is absolutely necessary if anything like a correct estimate of responsibility is to be secured. And even then it is not determinable in every instance, for omniscience alone could avoid mistakes in such endeavors. If arbitrary standards are to be made it would be well for a merciful profession, such as medicine, to run no risks of misjudging.

To test the English and Canadian legal criterion of responsibility, Dr. R. M. Bucke, Medical Superintendent of the London, Ontario, Asylum,[1] examined every patient resident in his asylum, aggregating 1,034, of whom 465 were males and 569 females. He found 763 able to realize and appreciate the nature and quality of such an act as homicide, and to understand that such an act was wrong and wicked. In more than half of these the appreciation and realization were as vivid as in the ordinary healthy man and woman. Of the remaining 271 there were 121 able to express an opinion on the subject, but seemingly, *ab initio*, or as a result of their diseased state, destitute of moral feeling, and these disclaimed any sense of repulsion from such an act, as well as any feeling or knowledge of its wrongfulness. The other 150 could give no intelligible answers.

Thus, of 1,034 patients, 763, or nearly three fourths, are, according to the law of the land, responsible for such an act as homicide, and under that law would be liable to be executed for such an act. But the law says that these are not responsible, and locks them up, many of them for life, in an asylum. The law cannot be right in both these contradictory assumptions. Not one of these 763 persons could legally, even if discharged from an asylum or if never admitted thereto, in their mental condition make a will or devote money as he may desire, but any one of them could be legally tried, convicted, and hung for so-called crime.

[1] 29th An. Rep. on Lunatic Asylums, Province of Ontario, 1896.

Dr. Bucke further instances two nearly similar cases of insanity, one of whom was hung for murder, but the other was debarred from presenting his poor sister with money he could easily have afforded to give her, as the act was adjudged to be that of a lunatic.

Easily demonstrated insanity, that approaches the popular estimate, of such disorders as wild mania, abject dementia, etc., raises no question of responsibility. It is the recognized insanity alone that enables us to draw the inference of irresponsibility. Then, by all means, in every other case as well the insanity should at least establish a reasonable doubt of responsibility, if nothing more. The jury expedient of penitentiary sentences in some homicide cases, when insanity is an issue, shows that the jury entertain the doubt, but juggle with their consciences, in a compromise verdict between asylum incarceration and hanging. Similarly, some medical experts entertain peculiar notions of responsibility of the different kinds of insane; for instance, where epilepsy and its insanity are under examination, or, in paranoia cases, so-called "partial insanity."

Epileptics in asylums have been known to take advantage of this recognition of their irresponsibility to do things they acknowledge they would not otherwise have done. Does this, as it is claimed by superficial thinkers, justify holding them accountable in such instances? It appears to me that such acts are further evidence of mental degradation within the limits of the general debasement characteristic of many insane epileptics. The bare fact that epileptic lunatics are thus inclined to act proves that the disease has this peculiar influence. At least no physician has a right to affirm positively that any act whatsoever of an offensive nature is not the product of this diseased mental state. Similarly with paranoiacs, whose entire life would have been vastly different had they been sane. Nothing short of being able to put one's self in the place of that degenerate, mentally and otherwise, would enable one to form a judgment as to what acts were insane and what sane, if any. It would be more in accord with the decency and modesty of a liberal profession for the physician to acknowledge the limitations of human knowledge, and refuse to grapple with problems he has no means of solving.

Many conscientious jurists claim that it is for the court to de-

termine, not only the matter of responsibility, but the question of insanity also, and, considering the kinds of evidence that are offered in trials where insanity is alleged, it results that the court can sustain the expert who advances the most cogent reasons, and discredit the mere pretender to knowledge, and thus the question as to what constitutes insanity, based upon the facts and expert opinions in each case, can probably be far better determined by such judicial methods than in any other way. Responsibility should similarly be relegated to the court; willingly, by the expert, under the circumstances; as, after all, the court, lawyers, and jury take into consideration what science has to say upon the subject under discussion. It is when the judiciary attempt to measure such vital matters by ancient, variable, and unwarranted "tests," and the Procrustean experiment results in manifest injustice, that the right of the court to determine what are insanity and responsibility can properly be criticised as having been misapplied.

The paranoiac form of degeneracy has given the world the most frequent, notorious, and far-reaching problems; and no writer has more ably presented histories of such cases, from that of Joan of Arc to Guiteau and Riel, than has W. W. Ireland in his interesting popular books[1] on such topics.

Great anger at the time of the homicide has been considered by legislators as sufficient to reduce the punishment, on the ground that it reduces the offense to manslaughter; but an irritable temper and excitable disposition do not constitute insanity; nor is the frenzy of violent passion, in the absence of mental disease, an excuse for crime. Even adultery does not justify homicide, where the deceased has debauched the wife of the prisoner.

Belief in spiritualism is not accepted by itself as supporting a theory of insanity and consequent irresponsibility.

The insanity plea has sometimes been introduced for the purpose of bringing facts before the jury which would excite sympathy and influence a verdict. For example, mayhem and an assault for the seduction of a wife in one case and a daughter in another were initially alleged as results of temporary insanity, to enable the defense to put in the plea of irresponsibility to present the actual circumstances to the jury, which cared nothing

[1] The Blot upon the Brain, and Through the Ivory Gates.

for the failure to establish the insanity, but everything for the mitigating facts.

Especial difficulties surround the determination of responsibility in the lucid intervals of intermittent cases, which have been compared to fever and ague, on the claim that the disease remains through the intermission.

That ideas of right and wrong are not inherent or intuitive, or that there is no universal standard of right or wrong, and hence of responsibility, has been suggested in connection with the great differences of opinion existing between sects and nations on the subject of polygamy and polyandry, or even promiscuity. The Thugs, a religious sect of India, are said to die of remorse when prevented by imprisonment from killing the requisite number of human beings they regard as necessary to secure "Nirvana," or immortal bliss, as they conceive it.

Popular ideas of responsibility in times of public excitement over some atrocity of the insane often invade the court-room, and an applauding or reviling mob has more than once guided and frightened jurors into compliance with the demands for lynching. Frequently the commonly made assertions that the accused "is sane enough to hang," or that dangerous lunatics should be executed on the "mad-dog principle," are changed, after vengeance is satisfied, to the acknowledgment that opposition to the insanity plea was only owing to the fact that it admitted irresponsibility. In other words, the public knew that the prisoner was insane and irresponsible, but was determined to hang him anyway. Savages hold their aged and sick to account for trouble they occasion, and not so very long ago flogging was the therapeusis for mania. It may safely be asserted that the lower the scale of intelligence the greater is the desire for vengeance, and the vulpine tendency to pounce upon and tear to pieces the wounded in life's struggle. Punishment cannot deter other insane persons from crime, and the most vulgar sentiment possible is revenge. Mercy is the outgrowth of the highest intelligence, which sees vastly better results therefrom than in the exercise of the prerogative of blind nature in visiting swift and invariable punishment for every infraction of her law, whether designed or accidental. As jurisprudence signalizes superiority over people who are without it, the higher jurisprudence will

avenge less, and adopt protective, preventive means more, by seeking to establish what is known as to diseased and other peculiarities of the mind, and dwelling less upon mere artificial gauges of "responsibility."

Tout comprendre c'est tout pardonner.

CHAPTER VII.

LEGAL ADJUDICATIONS IN CRIMINAL CASES.

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- § 1. *What insanity affects criminal responsibility.*
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- § 3. *Delusion test.*
- § 4. *Abstract right and wrong test.*
- § 5. *Test of right and wrong as to particular act.*
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VII. INCAPACITY OF FEMALE WHICH WILL AFFECT RAPE.

I. General insanity.

§ 1. *What insanity affects criminal responsibility.*

The rule is laid down generally that a person who, acting under the impulse of mental disease, commits a crime, is not criminally accountable therefor,[1] and that a person of insane mind is not subject to punishment for his criminal acts,[2] insanity being deemed an excuse whenever it was the efficient cause of the criminal act,[3] though brought on by the vices of the party himself.[4] But the mere fact that a person is insane does not *per se* relieve him from criminal responsibility.[5] A slight departure from a well-balanced mind cannot be recognized as insanity in the administration of the criminal law, though it might be pronounced insanity in medical science.[6]

It is not medical, but legal, insanity which is required to relieve from criminal responsibility,[7] though the law of insanity can only be properly dealt with from a harmonious treatment of the two sciences of law and medicine.[8] One may be criminally responsible where he is so under the guidance of reason as to be legally answerable for his acts, though he is suffering from mental derangement,[9] and though he may not be capable of weighing the

[1] Hite v. Sims, 94 Ind. 333; Sage v. State, 91 Ind. 141; Cluck v. State, 40 Ind. 263; Goodwin v. State, 96 Ind. 550; Warner v. State, 114 Ind. 137; Lilly v. People, 148 Ill. 467; State v. Jones, 50 N. H. 369, 9 Am. Rep. 242; Giebel v. State, 28 Tex. App. 151; Smith v. State, 19 Tex. App. 95; State v. Felter, 25 Iowa, 67; State v. Mewherter, 46 Iowa, 88; Walker v. People, 88 N. Y. 86; Clark v. State, 8 Tex. App. 350; Smith v. State, 22 Tex. App. 317.

[2] State v. Gardiner, 1 Wright (Ohio) 392.

[3] Lilly v. People, 148 Ill. 467; State v. Jones, 50 N. H. 369, 9 Am. Rep. 242.

[4] Cluck v. State, 40 Ind. 263; State v. Erb, 74 Mo. 199. See also chap. XIV. *The Decisions of the Courts as to Alcoholism.*

[5] People v. O'Connell, 62 How. Pr. 436; People v. Montgomery, 13 Abb. Pr. N. S. 207; Burgo v. State, 26 Neb. 369.

[6] Taylor v. Com. 109 Pa. 262.

[7] Leache v. State, 22 Tex. App. 279, 58 Am. Rep. 638. And see State v. Hockett, 70 Iowa, 442.

[8] Guiteau's Case, 10 Fed. Rep. 161.

[9] State v. Murray, 11 Or. 413; Clark's Case, 1 City Hall Rec. 176; State v. Pagels, 92 Mo. 300; Hornish v. People, 142 Ill. 620, 18 L. R. A. 237; State v. Bundy, 24 S. C. 439, 58 Am. Rep. 262; Goodwin v. State, 96 Ind. 550; State v. Maier, 36 W. Va. 757; Hadfield's Case, 27 How. St. Tr. 1282.

reasons for and against the act.[1] The possession of sound faculties and full vigor of mind, unimpaired by disease or infirmity, is not required as a condition of criminal responsibility.[2] In order to be criminally responsible one must have intelligence and capacity to have a criminal intent and purpose, and if his mental powers are so deficient that he has no will or conscience or controlling mental power, or if from the overwhelming violence of mental disease his intellectual power is for the time obliterated, he is not criminally responsible,[3] the question to be determined being whether, at the time of the act, he had the mental capacity to entertain a criminal intent, and whether in point of fact he did entertain it.[4] Mental disorders cannot be regarded as evidence of insanity which will confer legal irresponsibility for crime, however, unless they are caused by or result from disease or lesion of the brain,[5] and the criminal act must have resulted from the unsoundness of mind,[6] and they must be so excessive as to overwhelm the reason, conscience, and judgment.[7] Thus, mere weakness of mind does not excuse crime,[8] nor will bad education or bad habits[9] nor the fact that the person is of a low order of intellect;[10] and proof that a person accused of crime

[1] State v. Swift, 57 Conn. 496.

[2] Leache v. State, 22 Tex. App. 279, 58 Am. Rep. 638; State v. Smith, 49 Conn. 376. And see Reg. v. Roberts, Ray, Medical Jurisprudence, § 10.

[3] Com. v. Rogers, 7 Met. 500, 41 Am. Dec. 458; King v. State, 9 Tex. App. 515. And see Anderson v. State, 43 Conn. 514, 21 Am. Rep. 669.

[4] State v. Jones, 50 N. H. 369, 9 Am. Rep. 242; Nevling v. Com. 98 Pa. 323; State v. Swift, 57 Conn. 496; Thomas v. State, 40 Tex. 60; Burkhard v. State, 18 Tex. App. 599.

[5] Gunter v. State, 83 Ala. 96; Parsons v. State, 81 Ala. 577, 60 Am. Rep. 193.

[6] United States v. Faulkner, 35 Fed. Rep. 730; State v. Geddis, 42 Iowa, 268; State v. Stickley, 41 Iowa, 232; State v. Hockett, 70 Iowa, 442; Conway v. State, 118 Ind. 482.

[7] State v. Murray, 11 Or. 413; Spann v. State, 47 Ga. 553; Com. v. Werling, 164 Pa. 559.

[8] People v. Hurley, 8 Cal. 390; Conway v. State, 118 Ind. 482; Wartena v. State, 105 Ind. 445; Studstill v. State, 7 Ga. 2; Fitzpatrick v. Com. 81 Ky. 357; Newcomb v. State, 37 Miss. 385; State v. Alexander, 30 S. C. 74, 14 Am. St. Rep. 879; Anderson v. State, 25 Neb. 550; Nevling v. Com. 98 Pa. 323.

[9] United States v. Cornell, 2 Mason, 91.

[10] Powell v. State, 37 Tex. 348; Fitzpatrick v. Com. 81 Ky. 357.

is of weak mind is inadmissible where it is admitted that he is neither insane nor an idiot nor a lunatic.[1] Neither is crime excused because committed under the influence of fear and excitement[2], or bad passion[3], or jealousy.[4] And unreasonable wrath and anger do not affect criminal responsibility where the reason is not actually dethroned[5]: and the rule is the same though they may temporarily dethrone reason or for the time being control the will, where the inability to control it arises from passion and not from insanity.[6] Mere frenzy or ungovernable passion, however furious, is not insanity within the meaning of the law,[7] though insanity produced by wrath or jealousy would operate as an excuse to the same extent as any other kind of insanity.[8] The unsoundness of mind which will excuse must be the result of disease, and not of allowing the passions to run until they become uncontrollable;[9] and where the conduct of the person is influenced by anger, rage, malice, love of gain, or a heart intently bent on mischief as distinguished from insanity produced by the visitation of God, he is responsible for his acts.[10] Neither is mere mental depravity insanity in a legal sense,[11] nor is eccentricity, oddity, or hypochondria,[12] nor is the depression following

[1] Studstill v. State, 7 Ga. 2; State v. Shoultz, 25 Mo. 128; Patterson v. People, 46 Barb. 625; Jacobs v. Com. 121 Pa. 586.

[2] People v. Hurley, 8 Cal. 390; Willis v. People, 32 N. Y. 715; People v. Divine, 1 Edm. Sel. Cas. 596.

[3] United States v. Cornell, 2 Mason, 91; Fitzpatrick v. Com. 81 Ky. 357.

[4] Aszman v. State, 123 Ind. 347, 8 L. R. A. 33; Guetig v. State, 66 Ind. 94, 32 Am. Rep. 99. And see People v. Foy, 138 N. Y. 664.

[5] Lynch v. Com. 77 Pa. 205; Bolling v. State, 54 Ark. 588; People v. Foy, 138 N. Y. 664; People v. Divine, 1 Edm. Sel. Cas. 596.

[6] Williams v. State, 50 Ark. 517; Bolling v. State, 54 Ark. 588; Smith v. State, 55 Ark. 259; State v. Stickley, 41 Iowa, 232; State v. Felter, 25 Iowa, 67; Welch v. Ware, 32 Mich. 77; People v. Mortimer, 48 Mich. 37; People v. Finley, 38 Mich. 482.

[7] Aszman v. State, 123 Ind. 247, 8 L. R. A. 33; Goodwin v. State, 96 Ind. 550; Sanders v. State, 94 Ind. 147; Guetig v. State, 66 Ind. 94, 32 Am. Rep. 99; People v. Finley, 38 Mich. 482; Willis v. People, 32 N. Y. 715; Cole's Case, 7 Abb. Pr. N. S. 321.

[8] People v. Foy, 138 N. Y. 664.

[9] People v. Durfee, 62 Mich. 487; Welch v. Ware, 32 Mich. 77.

[10] Com. v. Farkin, 2 Pa. L. J. 475; Nevling v. Com. 98 Pa. 323.

[11] Goodwin v. State, 96 Ind. 550.

[12] Hawe v. State, 11 Neb. 537, 38 Am. Rep. 375; State v. Shippey, 10

physical illness such as takes place ordinarily with men possessing fair average mental powers.[1] Insanity which will excuse crime must be, not the mere impulse of passion or idle, frantic humor, but an absolute dispossession of the free and natural agencies of the mind,[2] though it need not be furious or manifested alike on all subjects.[3] And criminal acts from malice and not from insanity are punishable, though the mind of the accused was so affected as to avoid his acts in a civil case as those of a lunatic.[4]

§ 2. *Infant or wild-beast test.*

The rule was laid down in an early English case that to be exempt from criminal responsibility one must be at the time so deprived of his understanding and memory as not to know what he was doing more than an infant or wild beast.[5] So, in a Connecticut case the court favored the rule that imbeciles ought not to be held criminally responsible unless of capacity equal to that of ordinary children of fourteen years of age, with the qualification that the comparison should be restricted to the matter of appreciating right and wrong and the consequences of the act, and that the child taken as a standard should be one in humble life with only ordinary training, and finally submitted the whole matter to the jury requiring it to say whether the person had such knowledge of right and wrong and such appreciation of the consequences and effects of his acts as to be a proper subject of punishment.[6] But in a late Texas case it was held that the fact that a person charged with homicide was of dull intellect and possessed about the intel-

Minn. 223, 88 Am. Dec. 70; Sindram v. People, 1 Park. Crim. Rep. 448; Com. v. Cleary, 148 Pa. 26; Com. v. Farkin, 2 Pa. L. J. 475; Com. v. Meredith, 17 Phila. 90; United States v. Young, 25 Fed. Rep. 710; Reg. v. Vaughan, 1 Cox, C. C. 80.

[1] Goodwin v. State, 96 Ind. 550.

[2] People v. Carnel, 2 Edm. Sel. Cas. 200; Com. v. Mosler, 4 Pa. 264; Com. v. Smith, 15 Phila. Leg. Int. 33, 6 Am. L. Reg. 257; Com. v. Shurlock, 14 Phila. Leg. Int. 33.

[3] United States v. Faulkner, 35 Fed. Rep. 730.

[4] King v. Tuth, 1 Wheeler, Crim. Cas. 52, note.

For Dr. Clevenger's discussion of this subject, see *Responsibility, Anger, Motive, Intent, Impulse, Malice, Frenzy, Eccentricity.*

[5] Arnold's Case, 16 How. St. Tr. 764, Harg. St. Tr. 322.

[6] State v. Richard, 39 Conn. 591.

ligence of the average boy of thirteen or fourteen years of age, though he was a matured man, does not show imbecility which will affect his criminal responsibility.[1]

§ 3. *Delusion test.*

The true test of the presence or absence of insanity has been stated to be the presence or absence of delusion,[2] insanity being always marked by delusions, delusions indicating an abnormal condition of the mind, and their absence being a characteristic of a sound mind.[3] And it has been held that the rejection of a special instruction with reference to an insane delusion is not error where the court instructed fully on the subject of insanity, as delusion is insanity,[4] and that refusal to define an insane delusion is not error where the charge was full upon the question of insanity, and especially that phase of it claimed to be a delusion.[5] But the contrary doctrine, that the absence or presence of delusion is not the true test of the absence or presence of insanity,[6] and that delusion cannot be said to be the only legal test as a rule of law,[7] would seem to be more in accordance with the tests given below. A delusion, however, is evidence of insanity.[8]

§ 4. *Abstract right and wrong test.*

Some of the cases have adopted the rule that the test of criminal responsibility is the mental ability to discriminate between abstract right and wrong.[9] Within this rule, where there is sufficient

[1] Rodgers v. State (Tex. Crim. App.) 28 S. W. 685. See more modern tests given below.

[2] Dew v. Clark, 3 Addams, Eccl. Rep. 79; Hadfield's Case, 27 How. St. Tr. 1282; Macklin's Case, 3 Coupor, 257.

[3] Com. v. Meredith, 17 Phila. 90.

[4] Boren v. State, 32 Tex. Crim. Rep. 637.

[5] Wilcox v. State, 94 Tenn. 106.

[6] Denson v. Beazley, 34 Tex. 191.

[7] Manhattan L. Ins. Co. v. Broughton, 109 U. S. 121, 27 L. ed. 878.

[8] Com. v. Meredith, 14 W. N. C. 188.

For Dr. Clevenger's discussion of this subject, see *Definitions, Tests of Insanity, Delusions*, chap. II., p. 12 *et seq.*

[9] State v. Redemeier, 71 Mo. 173, 36 Am. Rep. 462; Hawe v. State, 11 Neb. 537; Walker v. People, 88 N. Y. 86, 1 N. Y. Crim. Rep. 7; Moett v. People, 85 N. Y. 373; Wagner v. People, 2 Keyes, 684; Giebel v. State, 28 Tex. App. 151; Trial of Kinloch, 25 How. St. Tr. 891, 997; Martin's Case, Shelford, Lunacy, 467.

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mental capacity to know right from wrong there is criminal responsibility,[1] but one who has not such capacity is not a proper subject of punishment for criminal acts;[2] and the insanity which will justify an acquittal must be such as to incapacitate the party to distinguish between right and wrong.[3] And an instruction in a prosecution for homicide, to convict if the accused had sufficient mind to know that he was violating the law of the land, whatever may have been his moral conception of the act, is erroneous as authorizing a conviction of one not having capacity to distinguish between right and wrong,[4] and so is an instruction that if the killing was done with malice it is murder, though the accused may have labored under partial insanity, as there can be no such thing as malice without mental accountability, and this cannot coexist with incapacity to distinguish right from wrong.[5]

§ 5. *Test of right and wrong as to particular act.*

So many of the cases have regarded the test of capacity to distinguish between right and wrong as concrete, having reference to the particular act in question, instead of as abstract, as to justify an inference, at least with respect to the later cases, that the abstract test was inadvertently stated, and that the court actually acted with reference to the act in question. The test stated in such cases is the question whether the accused is capable of distinguishing between right and wrong with respect to the act

[1] Conway v. State, 118 Ind. 482; Hornish v. People, 142 Ill. 620, 18 L. R. A. 237; People v. Waltz, 50 How. Pr. 204; Clark's Case, 1 City Hall Rec. 176, 1 Wheeler, Crim. Cas. 218, note; Nevling v. Com. 98 Pa. 323, Stuart v. State, 1 Baxt. 178.

[2] United States v. Shults, 6 McLean, 122; Anderson v. State, 42 Ga. 9, Hays v. Com. (Ky.) 33 S. W. 1104; Willis v. People, 32 N. Y. 715; Com. v. Winnemore, 1 Brewst. 356.

[3] Beasley v. State, 50 Ala. 149, 20 Am. Rep. 292; Brinkley v. State, 58 Ga. 296; Spann v. State, 47 Ga. 553; Cunningham v. State, 56 Miss. 269, 21 Am. Rep. 360; Burgo v. State, 26 Neb. 639; Com. v. Farkin, 2 Pa. L. J. 475; Reg. v. Davies, 1 Fost. & F. 69; Reg. v. Higginson, 1 Car. & K. 129; Parker's Case, 1 Collinson Lunacy, 477.

[4] Kearney v. State, 68 Miss. 233.

[5] Grissom v. State, 62 Miss. 167.

For Dr. Clevenger's discussion of this subject, see *Abstract Right and Wrong Tests*, chap. II., p. 18.

which he commits.[1] Within this rule one who is not capable of distinguishing right from wrong in regard to the act charged is not criminally accountable therefor.[2] But he is accountable if he has such capacity.[3] In order to be responsible, however, he must have sufficient power of memory to recollect the relation in which he stands to others and in which others stand to him, and that the act he is doing is contrary to the dictates of justice and right, and injurious to others;[4] and the insanity which will excuse must amount to a derangement so great as to obliterate the sense of

[1] People v. M'Dowell, 47 Cal. 134; People v. Hobson, 17 Cal. 424; State v. Richard, 39 Conn. 591; State v. Danby, 1 Houst. Crim. Cas. 166; State v. Pratt, 1 Houst. Crim. Cas. 249; Loyd v. State, 45 Ga. 57; Choice v. State, 31 Ga. 424; Carr v. State, 96 Ga. 284; State v. Mowry, 37 Kan. 369; State v. Turlington, 102 Mo. 642; State v. Kotovsky, 74 Mo. 247; State v. Redemeier, 71 Mo. 173, 36 Am. Rep. 462; State v. Erb, 74 Mo. 199; State v. Hayes, 16 Mo. App. 560; State v. Martin (N. J.) 3 Crim. L. Mag. 44; Moett v. People, 85 N. Y. 373; People v. Casey, 2 N. Y. Crim. Rep. 187; People v. Coleman, 1 N. Y. Crim. Rep. 1; People v. O'Connell, 62 How. Pr. 436; Walker v. People, 1 N. Y. Crim. Rep. 7, 22; Blackburn v. State, 23 Ohio St. 146; Clark v. State, 12 Ohio, 483, 40 Am. Dec. 481; Com. v. Sayres, 12 Phila. 553; Com. v. Freeth, 5 Pa. L. J. 455; State v. McIntosh, 39 S. C. 97; Wilcox v. State, 94 Tenn. 106; Stuart v. State, 1 Baxt. 178; Evers v. State, 31 Tex. Crim. Rep. 318, 18 L. R. A. 421; Thomas v. State, 40 Tex. 60; Carter v. State, 12 Tex. 500, 62 Am. Dec. 539; Burkhard v. State, 18 Tex. App. 599; Erwin v. State, 10 Tex. App. 700; Williams v. State, 7 Tex. App. 163; People v. Calton, 5 Utah, 451; United States v. McGlue, 1 Curt. C. C. 1; Bellingham's Case, 1 Collinson, Lunacy, 636; Bowler's Case, 1 Collinson, Lunacy, 673.

[2] Parsons v. State, 81 Ala. 577, 60 Am. Rep. 193; State v. Thomas, 1 Houst. Crim. Cas. 511; Furst v. State, 31 Neb. 403; State v. Spencer, 21 N. J. L. 196; Com. v. Sayres, 12 Phila. 553; Com. v. Moore, 2 Pittsb. 502; Newcomb v. State, 37 Miss. 385.

[3] State v. Reidell, 9 Houst. 470; Humphreys v. State, 45 Ga. 190; Roberts v. State, 3 Ga. 310; Choice v. State, 31 Ga. 424; Com. v. Rogers, 7 Met. 500, 41 Am. Dec. 458; Anderson v. State, 25 Neb. 550; Hart v. State, 14 Neb. 572; State v. Lewis, 20 Nev. 333; Willis v. People, 32 N. Y. 715, 5 Park. Crim. Rep. 621; State v. Haywood, 1 Phill. L. 376; State v. Murray, 11 Or. 413; State v. Zorn, 22 Or. 591; State v. Kalb, 2 Ohio Legal News, 364; Stuart v. State, 1 Baxt. 178; Warren v. State, 9 Tex. App. 619, 35 Am. Rep. 745; State v. Maier, 36 W. Va. 757; M'Naghten's Case, 10 Clark & F. 200.

[4] Com. v. Rogers, 7 Met. 500, 41 Am. Dec. 453; United States v. Faulkner, 35 Fed. Rep. 730.

right and wrong as to the particular act done at that time,[1] or render the party unconscious that in doing the particular act he is committing a crime,[2] or render him unable to apply such knowledge and be controlled by it.[3]

Most of the cases do not distinguish between right and wrong in the moral sense and in the legal sense; but while ability to distinguish between moral good and evil has been held to be the test,[4] a great majority of the modern cases in which the question has been adverted to would seem to hold that there must be an absence of knowledge that the act is wrong either in a moral or in a legal sense, in order to relieve from criminal responsibility.[5]

§ 6. *Test of knowledge of the nature of the act.*

Some of the cases have made capacity to understand the nature, character, and consequences of the act a test of criminal responsibility, holding that to be effectual as a defense the insanity must be such as to render the accused unconscious of such nature, character, and consequences,[6] and that a person is entitled to an acquit-

[1] McAllister v. State, 17 Ala. 434, 52 Am. Dec. 180; Marceau v. Travelers' Ins. Co. 101 Cal. 338; Hornish v. People, 142 Ill. 620, 18 L. R. A. 237; State v. Wright (Mo.) 35 S. W. 1145; State v. Pagels, 92 Mo. 300; State v. Erb, 74 Mo. 199; People v. Montgomery, 13 Abb. Pr. N. S. 207; State v. Alexander, 30 S. C. 74, 14 Am. St. Rep. 879; Clark v. State, 8 Tex. App. 350; Smith v. State, 22 Tex. App. 316; Giebel v. State, 28 Tex. App. 151; Rex v. Offord, 5 Car. & P. 168; Bellingham's Case, 1 Collinson, Lunacy, 636; Reg. v. Vaughan, 1 Cox, C. C. 80.

[2] McAllister v. State, 17 Ala. 434, 52 Am. Dec. 180.

[3] Mcfarland's Trial, 8 Abb. Pr. N. S. 69.

[4] Trial of Kinloch, 25 How. St. Tr. 891, 997.

[5] See McAllister v. State, 17 Ala. 434, 52 Am. Dec. 180; People v. Pico, 62 Cal. 50; State v. Mowry, 37 Kan. 369; Choice v. State, 31 Ga. 424; Com. v. Rogers, 7 Met. 500, 41 Am. Dec. 458; State v. Lewis, 20 Nev. 333; Willis v. People, 32 N. Y. 715, 5 Park. Crim. Rep. 621; Moett v. People, 85 N. Y. 373; Mcfarland's Trial, 8 Abb. Pr. N. S. 69; Blackburn v. State, 23 Ohio St. 146; Clark v. State, 12 Ohio St. 483, 40 Am. Dec. 481; Com. v. Sayres, 12 Phila. 553; State v. Alexander, 30 S. C. 74, 14 Am. St. Rep. 879; State v. McIntosh, 39 S. C. 97; Bellingham's Case, 1 Collinson, Lunacy, 636; Reg. v. Townley, 3 Fost. & F. 839.

For Dr. Clevenger's discussion on this subject, see *Particular Right and Wrong Tests*, chap. II., p. 23.

[6] State v. Gut, 13 Minn. 343; Humphreys v. State, 45 Ga. 190; Fisher v. State, 23 Ill. 283; Russell v. State, 53 Miss. 367; O'Brien v. People, 36

tal where he was mentally unconscious of the nature of his acts at the time,[1] but would be criminally responsible if he had sufficient mind to be conscious of what he was doing.[2] Thus, the test of insanity as a defense to a prosecution for an attempt to commit suicide has been held to be whether or not the party had a mind capable of contemplating the act charged and did in fact intend to destroy his life.[3] And one who sets fire to the house of another while in such a state of mind that he is not conscious that the effect of it would be to injure anyone is not criminally responsible.[4] So, where the case depends upon the sanity of the accused he cannot be convicted of larceny unless the jury are satisfied that he had sufficient mind to see all the essential ingredients of the offense and acknowledge their existence; the mere recognition of the fact that the property stolen belonged to another would not be sufficient.[5] And one who acts by persuasion of another, and is without mind enough to resist such persuasion, cannot commit burglary and larceny.[6]

§ 7. *Combination of the above tests.*

More frequently, however, it is regarded as necessary that the accused should not only be incapable of knowing the nature and character of the act, but also that he should be without capacity to distinguish between right and wrong with reference to it, the test in such case being whether the accused had sufficient use of his reason to understand the nature and character of the act and to know that it was wrong for him to commit it.[7] Under this

N. Y. 276; People v. Pine, 2 Barb. 566; State v. Brandon, 8 Jones, L. 463; Bellingham's Case, 1 Collinson, Lunacy, 636.

[1] Cole's Trial, 7 Abb. Pr. N. S. 321; Revoir v. State, 82 Wis. 295.

[2] Brown v. Com. 78 Pa. 122; Com. v. Werling, 164 Pa. 559; State v. Swift, 57 Conn. 496; Reg. v. Townley, 3 Fost. & F. 839; Com. v. Jones, 1 Leigh, 612.

[3] Reg. v. Doody, 6 Cox, C. C. 463.

[4] Reg. v. Davies, 1 Fost. & F. 69.

[5] People v. Cummins, 47 Mich. 334.

[6] Hays v. Com. (Ky.) 33 S. W. 1104.

For Dr. Clevenger's discussion on this subject, see *Knowledge of the Nature of the Act, Tests of Insanity*, chap. II., p. 18.

[7] Guiteau's Case, 10 Fed. Rep. 161; People v. Pico, 62 Cal. 50; State v. O'Neil, 51 Kan. 651, 24 L. R. A. 555; State v. Redemeier, 71 Mo. 173, 36 Am. Rep. 462; Freeman v. People, 4 Denio, 9, 47 Am. Dec. 216;

doctrine one who is laboring under disease of the mental faculties to such an extent that he does not know what he is doing, or that what he does is wrong, is not criminally responsible,[1] and he cannot escape punishment unless that degree of incapacity is established.[2] But a person is criminally responsible for his acts if he had capacity and reason sufficient to enable him to distinguish between right and wrong, and understand the nature of his act and his relation to the party injured,[3] and sufficient mental power to apply that knowledge to his own case,[4] though it would perhaps be going too far to say that he would be responsible in every case where he had a glimmering of knowledge of what was right and wrong.[5]

Quite a number of well-considered adjudications, however, have looked upon the question of knowledge of right and wrong, and that of capacity to know the nature of the act, as alternative, holding the test of criminal responsibility to be whether the accused at the time of committing the act was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or, if he did know, that he did not know that he was doing wrong.[6]

Walker v. People, 1 N. Y. Crim. Rep. 7, 22; State v. Potts, 100 N. C. 457; State v. Payne, 86 N. C. 609; Blackburn v. State, 23 Ohio St. 146; Reg. v. Layton, 4 Cox, C. C. 149; Com. v. Platt, 11 Phila. 421; Davis v. United States, 165 U. S. 373, 41 L. ed. 750.

[1] Guiteau's Case, 10 Fed. Rep. 161; State v. Zorn, 22 Or. 591; Com. v. Bezek, 168 Pa. 603; Arnold's Case, 16 How. St. Tr. 695.

[2] State v. Redemeier, 8 Mo. App. 1; Com. v. Farkin, 2 Pa. L. J. 475; Leache v. State, 22 Tex. App. 279, 58 Am. Rep. 638; State v. Shippey, 10 Minn. 223, 88 Am. Dec. 70; Fitzpatrick v. Com. 81 Ky. 357; McNaghten's Case, 10 Clark & F. 200; Reg. v. Oxford, 9 Car. & P. 525; Reg. v. Townley, 3 Fost. & F. 839; Bellingham's Case, 1 Collinson, Lunacy, 636; Rex v. Offord, 5 Car. & P. 169.

[3] State v. Gut, 13 Minn. 343; State v. West, 1 Houst. Crim. Cas. 371; State v. O'Neil, 51 Kan. 651, 24 L. R. A. 555; Spencer v. State, 69 Md. 28; Loeffner v. State, 10 Ohio St. 599; State v. Haywood, 1 Phill. L. 376; Nevling v. Com. 98 Pa. 323; State v. Bundy, 24 S. C. 439, 58 Am. Rep. 262; Stuart v. State, 1 Baxt. 178; Reg. v. Townley, 3 Fost. & F. 839.

[4] State v. Gut, 13 Minn. 343; State v. Shippey, 10 Minn. 223, 88 Am. Dec. 70; State v. West, 1 Houst. Crim. Cas. 371.

[5] Reg. v. Layton, 4 Cox, C. C. 149.

[6] United States v. Young, 25 Fed. Rep. 710; People v. Coffman, 24 Cal. 230; People v. Walter, 1 Idaho, 386; State v. Lawrence, 57 Me. 574; State

§ 8. *Cases denying the existence of a test.*

Several well-considered cases which must be deemed to establish the doctrine, at least in Alabama and New Hampshire, deny the existence of any legal tests of insanity as a defense in a criminal prosecution, holding that the courts cannot undertake to say what are the invariable or infallible tests as to insanity which will relieve from criminal responsibility,[1] and that whether a person accused of crime had a mental disease is as much a question of fact as whether he had a bodily disease, and whether the criminal act was the product of that disease is also clearly a matter of fact,[2] and that the question whether there is any universal test, as well as what that test may be, is also one of fact.[3] Under this doctrine no certain or definite rule can be laid down as to what unsoundness of mind will excuse crime; the most that can be done is to so shape the law in each particular case that there is no danger of an insane man being punished for an offense to which his mind never assented.[4] The only element of law which enters into the question of the existence of insanity as a defense is that no man shall be held accountable criminally for an act which is the offspring of mental disease.[5] And it is for the jury to say whether or not the crime was the product of mental disease, and return their verdict of guilty or not guilty by reason of insanity as they find the fact to be.[6]

v. Klinger, 43 Mo. 127; Anderson v. State, 25 Neb. 550; State v. Martin (N. J.) 3 Crim. L. Mag. 44; Freeman v. People, 4 Denio, 9, 47 Am. Dec. 216; Flanagan v. People, 52 N. Y. 457, 11 Am. Rep. 731; People v. Kleim, 1 Edm. Sel. Cas. 13; Com. v. McCaulley, 16 Phila. 502; Webb v. State, 5 Tex. App. 596; Clark v. State, 8 Tex. App. 350; Smith v. State, 19 Tex. App. 444; Kleim's Case, Ray, Medical Jurisprudence, § 42. And see Revoir v. State, 82 Wis. 295.

For Dr. Clevenger's discussion on this subject, see *Tests of Insanity, Definitions*, chap. II., p. 18.

[1] Parsons v. State, 81 Ala. 577, 60 Am. Rep. 193.

[2] State v. Jones, 50 N. H. 369, 9 Am. Rep. 242.

[3] State v. Jones, 50 N. H. 369, 9 Am. Rep. 242.

[4] State v. Reddick, 7 Kan. 143.

[5] State v. Jones, 50 N. H. 369, 9 Am. Rep. 242.

[6] State v. Jones, 50 N. H. 369, 9 Am. Rep. 242.

For Dr. Clevenger's discussion on this subject, see *Tests of Insanity, Definitions, Responsibility*, chap. II. p. 24.

§ 8*a*. *The case of State v. Jones.*

Alienists heartily approve of the decision in the case of *State* v. *Jones*, 50 N. H. 369, 9 Am. Rep. 242, and claim that it marks an epoch in the history of the better conformation of the law to advanced medical opinion. In view of this opinion as to its importance, the report of the case is here given in full so far as it bears upon the question of insanity:

The defendant was found guilty of murder in the first degree, upon an indictment charging him with having murdered his wife. Defense, insanity. There was evidence tending to show that defendant believed his wife guilty of adultery with one French, and that he killed her for that reason. This belief was alleged, on the part of the defendant, to have been an insane delusion.

The defendant excepted to the several refusals of the court to give the jury each of the following instructions:

"1. Under this indictment the defendant cannot be convicted of murder in the first degree.

"2. If the defendant was diseased in mind to any extent whatever, and the mental disease under which he labored had any influence whatever in leading him to kill his wife, he was not responsible.

"3. Any degree of insanity or delusion, and especially such insanity or delusion as would render the defendant incompetent to make a will, makes him also incapable of crime and not responsible, though the jury may be unable to trace any connection between the partial insanity and the act complained of.

"4. Delusion is the legal test of insanity.

"5. If the defendant was under the influence of any insane delusion whatever, or any insane delusion connected with the killing of his wife, he was not responsible.

"6. Knowledge of right and wrong, in respect to the act in question, is the legal test of insanity.

"7. If the defendant killed his wife under the control of an irresistible impulse, he is not legally responsible.

"8. The defendant excepted to the following instructions given to the jury:

"If the defendant killed his wife in a manner that would be criminal and unlawful if the defendant were sane, the verdict

should be 'not guilty by reason of insanity,' if the killing was the offspring or product of mental disease in the defendant.

"Neither delusion, nor knowledge of right and wrong, nor design or cunning in planning and executing the killing and escaping or avoiding detection, nor ability to recognize acquaintances, or to labor, or transact business, or manage affairs, is, as a matter of law, a test of mental disease; but all symptoms and all tests of mental disease are purely matters of fact, to be determined by the jury. Whether the defendant had a mental disease, and whether the killing of his wife was the product of such disease, are questions of fact for the jury.

"Insanity is mental disease—disease of the mind. An act produced by mental disease is not a crime. If the defendant had a mental disease which irresistibly impelled him to kill his wife, if the killing was the product of mental disease in him, he is not guilty; he is innocent—as innocent as if the act had been produced by involuntary intoxication, or by another person using his hand against his utmost resistance. Insanity is not innocence unless it produced the killing of his wife.

"If the defendant had an insane impulse to kill his wife, and could have successfully resisted it, he was responsible. Whether every insane impulse is always irresistible is a question of fact. Whether, in this case, the defendant had an insane impulse to kill his wife, and whether he could resist it, are questions of fact.

"Whether an act may be produced by partial insanity when no connection can be discovered between the act and the disease, is a question of fact.

"The defendant is to be acquitted on the ground of insanity, unless the jury are satisfied, beyond a reasonable doubt, that the killing was not produced by mental disease.

"The defendant was sentenced, and filed this bill of exceptions.

"*Wm. C. Clark*, Attorney General, for the State.

"*Hatch & Wiggin* for defendant.

"Ladd, J. (after deciding some minor questions): The remaining and most important questions in the case arise upon the instructions given by the court to the jury, and the refusal to give instructions requested by defendant's counsel.

"When, as in this case, a person charged with crime admits

the act, but sets up the defense of insanity, the real ultimate question to be determined seems to be, whether, at the time of the act, he had the mental capacity to entertain a criminal intent —whether, in point of fact, he did entertain such intent.

"In solving that problem, as in all other cases, it is for the court to find the law, and for the jury to find the fact. The main question for our consideration here is, What part of this difficult inquiry is law, and what part fact?

"It will be readily agreed, as said by Shaw, Ch. J., in *Com.* v. *Rogers*, 7 Met. 500, 41 Am. Dec. 458, that 'if the reason and mental powers of the accused are either so deficient that he has no will, no conscience, or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts.'

"But experience and observation show that, in most of the cases which come before the courts, where it is sufficiently apparent that disease has attacked the mind in some form and to some extent, it has not thus wholly obliterated the will, the conscience, and mental power, but has left its victim still in possession of some degree of ability in some or all these qualities. It may destroy, or it may only impair and becloud, the whole mind; or it may destroy, or only impair, the functions of one or more faculties of the mind. There seem to be cases where, as Erskine said in *Hadfield's Case*, 27 How. St. Tr. 1282, 'reason is not driven from her seat, but distraction sits down upon it along with her, holds her trembling upon it, and frightens her from her propriety.'

"The term 'partial insanity' has been applied to such cases by writers and judges, from Lord Hale to Chief Justice Shaw, where, as has been said, 'the mind may be clouded and weakened, but not incapable of remembering, reasoning, and judging;' and it is here that the difficulty of the subject begins, and that confusion and contradiction in the authorities make their appearance.

"'No one can say where twilight ends or begins, but there is ample distinction between night and day.' We are to inquire whether a universal test has been found wherewith to determine in all cases the line between criminal accountability and non-

accountability—between the region of crime and innocence—in those cases which lie neither wholly in the darkness of night nor the light of day. If such a test exists, or if one can be found, it is of the utmost importance that it be clearly defined and broadly laid down, so that when it is given to a jury, it may aid rather than confuse them. To ascertain whether a rule has hitherto been found, we must look to the authorities; and so far as we have been able to examine them, the leading and familiar English cases and authorities are substantially as follows:

"Lord Hale said the mental capacity ordinarily possessed by a child fourteen years old was the test.

"Mr. Justice Tracy, in *Arnold's Case* (1724), said: 'It must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast' (16 How. St. Tr. 764); and the same doctrine substantially seems to have been acted on in the *Trial of Ferrers*, 19 How. St. Tr. 947.

"The next prominent case in the books is *Hadfield's Case* (1800) 27 How. St. Tr. 1282; and all I desire to say of that case, in this connection, is that it seems to stand by itself. It was clear that Hadfield knew right from wrong; it was clear that he knew the nature of the act he was about to commit; it was clear he manifested design, foresight, and cunning in planning and executing it; and it was clear he knew it would subject him to punishment, which was, indeed, his motive in committing it. The most that can be said of it is, that everybody saw he was insane, and that his insanity produced the act.

"Next come three cases tried in the year 1812, *Parker's Case*, reported in 1 Collinson, Lunacy, 477; *Bowler's Case*, 1 Collinson, Lunacy, 673; and *Bellingham's Case*, 1 Collinson, Lunacy, 636, in each of which a more humane rule than that of Mr. Justice Tracy was adopted, namely, that knowledge of right and wrong, considered as abstract qualities, was the test; although in *Bowler's Case*, Mr. Justice Le Blanc added a further test, clearly suggested by, and growing out of, the facts of that particular case, and designed to furnish the rule by which the jury should be guided in deciding it, rather than by the formula in respect to right and wrong, namely, that it was for the jury to determine whether the prisoner was under any illusion in respect to the prosecutor,

which rendered his mind, at the moment, insensible of the nature of the act he was about to commit. And in *Bellingham's Case*, 1 Collinson, Lunacy, 636, Sir James Mansfield, Ch. J., took the extraordinary liberty of changing the whole scope and meaning of the rule by telling the jury, in addition, that 'it must, in fact, be proved beyond all doubt, that at the time he committed the atrocious act . . . he did not consider that murder was a crime against the laws of God and nature.'

"It can hardly be contended that these three cases go far toward establishing a rule; for there is not much reason in calling that a rule which the judge at the trial may feel at liberty to change, for the purpose of bringing about a conviction or acquittal, according to his individual view of the facts appearing in the case before him.

"But these remarks of Mansfield, Ch. J., were approved by Lord Lyndhurst, in *Rex* v. *Offord* (1831) 5 Car. & P. 168, although he, in the same breath, or at least in the same charge to the jury, laid down another and a new test, which seems to be entirely inconsistent with the rule in *Bellingham's Case*, 1 Collinson, Lunacy, 636, namely, that the jury must be satisfied, before they could acquit the prisoner on the ground of insanity, that he did not know when he committed the act, what the effect of it, if fatal, would be with reference to the crime of murder. This is not so clear as might be desired, but I should suppose it would strike the average apprehension of a jury as about equivalent to telling them that he must know that the killing would be murder; which is a qualification of the rule as much in favor of life as Sir James Mansfield's was in favor of death.

"In *Reg.* v. *Oxford* (1840) 9 Car. & P. 525, Lord Denman charged the jury: 'If some controlling disease was, in truth, the acting power within him, which he could not resist, then he will not be responsible. It is not more important than difficult to lay down the rule by which you are to be governed. . . . On the part of the defense it is contended that the prisoner at the bar was *non compos mentis*, that is (as it has been said), unable to distinguish right from wrong, or, in other words, that from the effect of a diseased mind he did not know at the time that the act he did was wrong. . . . Upon the whole, the question will be, whether all that has been proved about the prisoner at the

bar shows that he was insane at the time when the act was done —whether the evidence given proves a disease in the mind as of a person quite incapable of distinguishing right from wrong. Something has been said about the power to contract, and to make a will. But I think that those things do not supply any test. The question is, whether the prisoner was laboring under that species of insanity which satisfies you that he was quite unaware of the nature, character, and consequences of the act he was committing, or, in other words, whether he was under the influence of a diseased mind, and was really unconscious, at the time he was committing the act, that it was a crime.'

"But three years afterwards, in *Reg.* v. *Higginson*, 1 Car. & K. 129, Mr. Justice Maule, apparently in utter disregard of the elaborate charge of Lord Denman in *Reg.* v. *Oxford*, said to the jury: 'If you are satisfied that the prisoner committed this offense, but you are also satisfied by the evidence that, at the time of the committing the offense, the prisoner was so insane that he did not know right from wrong, he should be acquitted on that ground; but if you think that, at the time of committing the offense, he did know right from wrong, he is responsible for his acts, although he is of weak intellect.' And again, in 1848, in *Reg.* v. *Stokes*, 3 Car. & K. 188, the same test knowledge of right and wrong in the abstract was applied by Baron Rolfe, who said: 'Every man is held responsible for his acts by the law of this country, if he can discern right from wrong.'

"The numerical preponderance of authority in England, as gathered from the cases thus far, would seem to be decidedly in favor of the rule that knowledge of right and wrong, without reference to the particular act, is the test; although their force is much shaken, if not wholly overthrown, by the qualifications which judges have seemed to feel at liberty to introduce, to meet their individual views, or the exigencies of particular cases; and especially by the charge of Lord Denman in *Reg.* v. *Oxford*.

"The memorable effort of the House of Lords, in 1843, to have the confusion and conflict of opinion which had arisen on this perplexing question all cleared away by one distinct and full avowal by the judges of what the law was and should be in relation to it is too conspicuous in the history of the subject to be passed without notice.

"It may safely be said that the character of the judges, and the circumstances under which the questions in *McNaghten's Case*, 10 Clark & F. 200,[1] were propounded to them by the House of Lords, make it morally certain that if, in the nature of things, clear, categorical, and consistent answers were possible, such answers would have been given. In other words, that if a safe, practical, legal test exists, it would have been then found by those very learned men, and declared to the world. Such a result would have brought order out of chaos, and saved future generations of lawyers and judges a vast amount of trouble in trying this kind of cases. But an examination of the answers given shows that they failed utterly to do any such thing; and it is not too much to say that, if they did not make the path to be pursued absolutely more uncertain and more dark, they at best shed but little light upon its windings, and furnish no plain or safe clue to the labyrinth.

"In answer to the first question all the judges, except Maule, say that 'notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law, by which expression we understand your lordship to mean the law of the land. Here is an entirely new element,—knowledge that he was acting contrary to the law of the land,—and hereupon the inquiry arises, Is a man, acting under a delusion of this sort, presumed to know the law of the land? The answer must be, Yes; for the judges say further on: 'The law is administered upon the principle that everyone must be taken conclusively to know it, without proof that he does know it.'

"Let this proposition be examined a moment. Knowledge that the act was contrary to the law of the land is here given as a test; that is, such knowledge is assumed to be the measure of mental capacity sufficient to entertain a criminal intent. By what possible means, it may be asked, can that test or measure be applied, without first finding out whether the prisoner, in fact,

[1] See note to Reg. v. Higginson, 1 Car. & K. 130.

knew what the law of the land was? How could a jury say whether a man knew, or did not know, that an act was contrary to the law of the land, without first ascertaining whether he knew what that law was?

"It was like saying that knowledge of some fact in science—as, for example, that a certain quantity of arsenic taken into the stomach will produce death—shall be the test, and at the same time saying that it makes no difference whether the prisoner ever heard of arsenic, or knows anything of its properties or not. Knowledge that the act is contrary to law might be taken as a measure of capacity to commit crime, and so might knowledge of any other specific thing that should be settled upon for that purpose, and such a test would be consistent and comprehensible, whether it were right or not; but when it is said that knowledge of a certain thing is the test, and then we are told in the next paragraph that it makes no difference whether the man ever heard of the thing or not, I confess that I am not able to see any opening for escape, out of the maze into which we are led. Whether a jury would be more successful, must depend, I suppose, on their comparative intelligence.

"In connection with this rule, it is useful to bear in mind that Hadfield knew he was doing an illegal act, and did it for the avowed purpose of bringing upon himself the punishment which he knew was the legal consequence of the act.

"Maule, J., holds that the general test of capacity to know right from wrong, in the abstract, is to be applied in the case supposed by the first question, the same as in any other phase of mental unsoundness.

"In answer to the second and third questions, which relate to the terms in which the matter should be left to the jury, the judges say that 'to establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.'

"Suppose, now, an insane man does an act which he knows to be contrary to law, because from an insane delusion (if that term amounts to anything more than the single term 'insanity') he

believes it to be right notwithstanding the law, that the law is wrong, or that the peculiar circumstances of the case make it right for him to disregard it in this instance: how are these two rules to be reconciled? It would seem to be plain that they are in hopeless conflict, and cannot both stand.

"Maule, J., says: 'The questions necessarily to be submitted to the jury are those questions of fact which are raised on the record. In a criminal trial, the question commonly is, whether the accused be guilty or not guilty; but in order to assist the jury in coming to a right conclusion on this necessary and ultimate question, it is usual and proper to submit such subordinate or intermediate questions as the course which the trial has taken may have made it convenient to direct their attention to. What those questions are, and the manner of submitting them, is a matter of discretion for the judge,—a discretion to be guided by a consideration of all the circumstances attending the inquiry. In performing this duty, it is sometimes necessary or convenient to inform the jury as to the law,' which, he repeats, is knowledge of right and wrong. He also says, there are no terms which the judge is by law required to use, only they must not be inconsistent with the law that knowledge of right and wrong is the test.

"The answer to the fourth question introduces a doctrine which seems to be very remarkable, to say the least. The question was: 'If a person, under an insane delusion as to existing facts, commits an offense, . . . is he thereby excused?' To which the answer was as follows: 'But, making the same assumption as we did before, namely, that he labors under such partial delusion only, and is not in other respects insane, . . . he must be considered in the same situation, as to responsibility, as if the facts, with respect to which the delusion exists, were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defense, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.'

"The doctrine thus promulgated as law has found its way into the text-books, and has doubtless been largely received as the

enunciation of a sound legal principle since that day. Yet it is probable that no ingenuous student of the law ever read it for the first time without being shocked by its exquisite inhumanity. It practically holds a man confessed to be insane accountable for the exercise of the same reason, judgment, and controlling mental power, that are required of a man in perfect mental health. It is, in effect, saying to the jury, the prisoner was mad when he committed the act, but he did not use sufficient reason in his madness. He killed a man because, under an insane delusion, he falsely believed the man had done him a great wrong which was giving rein to a motive for revenge, and the act is murder. If he had killed a man only because, under an insane delusion, he falsely believed the man would kill him if he did not do so that would have been giving rein to an instinct of self-preservation, and would not be crime. It is true, in words, the judges attempted to guard against a consequence so shocking, as that a man may be punished for an act which is purely the offspring and product of insanity, by introducing the qualifying phrase, 'and is not in other respects insane.' That is, if insanity produces the false belief, which is the prime cause of the act, but goes no further, then the accused is to be judged according to the character of motives which are presumed to spring up out of that part of the mind which has not been reached or affected by the delusion or disease. This is very refined. It may be that mental disease sometimes takes a shape to meet the provisions of the ingenious formula; or, if no such case has ever yet existed, it is doubtless within the scope of omnipotent power hereafter to strike with disease some human mind in such peculiar manner that the conditions will be fulfilled; and when that is done, when it is certainly known that such a case has arisen, the rule may be applied without punishing a man for disease. That is, when we can certainly know that, although the false belief on which the prisoner acted was the product of mental disease, still, that the mind was in no other way impaired or affected, and that the motive to the act did certainly take its rise in some portion of the mind that was yet in perfect health, the rule may be applied without any apparent wrong. But it is a rule which can be safely applied in practice that we are seeking; and to say that an act which grows wholly out of an insane belief that some great

wrong has been inflicted, is at the same time produced by a spirit of revenge springing from some portion or corner of the mind that has not been reached by the disease, is laying down a pathological and psychological fact which no human intelligence can ever know to be true, and which, if it were true, would not be law, but pure matter of fact. No such distinction ever can or will be drawn in practice; and the absurdity as well as inhumanity of the rule seems to me sufficiently apparent without further comment.

"To form a correct estimate of the value of these answers, we have only to suppose that, at the end of a criminal trial where the defense is insanity, they be read to the jury for their guidance in determining the question with which they are charged. Tried by this practical test, it seems to me they utterly fail; and the reason of the failure, as I think, is that it was an attempt to lay down as law that which, from its very nature, is essentially matter of fact. It is a question of fact whether any universal test exists, and it is also a question of fact what the test is, if any there be.

"The efforts of text-writers to extract a rule from the cases have not, in my judgment, been more successful. See 1 Russell, Crimes & Misdemeanors, 13; Roscoe, Crim. Ev. 944. It is worthy of notice, however, that Mr. Chitty lays down a rule from which is excluded all reference to knowledge of right and wrong or moral good and evil; thus:

"'Where there is only such partial derangement as leaves the party free to act or to forbear in the particular case in question, or where he is guilty of the crime during a lucid interval, he will be equally liable to punishment with those who are perfectly sane. Where, however, the mind labors under such a delusion that, though it discerns some objects clearly, it is totally deranged as to the objects of its attack, the party will be entitled to an acquittal.' 3 Chitty, Crim. Law, 725. To my mind this is but another form of saying that where the act is the product of mental disease it is not crime, which was the instruction given in this case.

"If we leave the English rule where it seems to be left by these authorities, I think an examination of the American cases will not lead to any more satisfactory result.

"In *Com.* v. *Rogers* (1844) 7 Met. 500, 41 Am. Dec. 458, Shaw,

Ch. J., instructed the jury that 'a person is not responsible for any criminal act he may commit, if, by reason of mental infirmity, he is incapable of distinguishing between right and wrong in regard to the particular act, and of knowing that the act itself will subject him to punishment; or has no will, no conscience, or controlling mental power; or has not sufficient power of memory to recollect the relations in which he stands to others, and in which others stand to him; or has his reason, conscience, and judgment so overwhelmed by the violence of disease as to act from an uncontrollable impulse.'

"Here seem to be four distinct tests. The first is substantially that given by Lord Denman in *Reg.* v. *Oxford*, 9 Car. & P. 525, but with one most important qualification added, namely, knowledge that the act will subject him to punishment. But how can it be said that such knowledge constitutes one of the links in a chain of conclusive evidence, that it is one fact in a chain of facts from which that degree of insanity which will excuse a person from crime is to be conclusively found?

"If that be so, then certainly a legal quality, effect, or significance is given to it by its position in the chain, which no one would ever think it possessed when standing alone. The desire for revenge may be so strong as to outweigh the fear of a punishment which a man without any mental disease knows must follow his act. But the rule is that, in addition to the knowledge of right and wrong in respect to the particular act, the accused must have been capable of knowing that the act itself would subject him to punishment.

"It is doubtless true that ability to know that a certain act will be followed by punishment furnishes evidence of the mental condition. So would knowledge of any other fact in law or science. But I can see no more reason for holding that such knowledge is any part of a legal test of capacity to commit crime, than for holding that knowledge of the cause of an eclipse is entitled to the same effect.

"The second rule relates to a case where there can be no doubt,—where the will, the conscience, and the controlling mental power are all gone; and the fourth is substantially the same,—where the reason, conscience, and judgment are so overwhelmed by the violence of disease, that he acts from uncontrollable im-

pulse. There can be no very appreciable legal distinction between a person who has no will, no conscience, or controlling mental power, and one whose reason, conscience, and judgment are so overwhelmed by the violence of disease as to act from an uncontrollable impulse. In both cases it is an act in which reason, conscience, judgment, and will do not participate,—in a word, it is the product of mental disease.

"Power of memory sufficient to recollect the relations in which he stands to others and which others stand to him, which is given as the third test, seems to me no more a legal criterion than power of memory to recollect any other fact which a healthy mind would be expected to remember; and such power of memory or its lack would be a fact, like other facts, for the jury to weigh in judging whether he had the mental capacity to entertain a criminal intent.

"There is no doubt but these instructions of the learned and eminent chief justice of Massachusetts have been largely followed in cases since tried in this country, but the course has been by no means uniform, as we shall see.

"In New York and Pennsylvania, in the two leading cases of *Freeman* v. *People*, 4 Denio, 9, 47 Am. Dec. 216, and *Com.* v. *Mosler*, 4 Pa. 267, capacity to distinguish right from wrong was given as the naked test. But in neither of those states has the rule thus laid down been followed with uniformity. In the trial of Huntington for forgery, in New York city, in 1856, Judge Capron said to the jury: 'To constitute a complete defense, insanity, if partial, as monomania must be such in degree as to wholly deprive the accused of the guide of reason in regard to the act with which he is charged, and of the knowledge that he is doing wrong in committing it.' And the remarks of Edmunds, J., in the earlier case of *People* v. *Kleim*, 1 Edm. Sel. Cas. 13, are wholly at war with any such rule as that promulgated in *Freeman* v. *People*, 4 Denio, 9, 47 Am. Dec. 216. He says: 'The moral as well as the intellectual faculties may be so disordered by the disease as to deprive the mind of its controlling and directing power;' that he must know the act to be wrong and punishable, and be able to compare and choose between doing it and not doing it.

"In Pennsylvania, in *Com.* v. *Knepley* (1850), knowledge of

right and wrong in regard to the particular act was given as the test; and in *Com.* v. *Haskell*, 2 Brewst. 491, the judge charged that 'the test in cases of insanity lies in the word "power." Has the defendant, in a criminal case, the power to distinguish right from wrong, and the power to adhere to the right and to avoid the wrong?'

"It would probably not be far out of the way to say that the number of American cases where knowledge of right and wrong in the abstract, and knowledge of the nature and quality of the act,—that it was wrong,—have been given as the test, is about equal, with a tendency of late years to the latter form; while it will appear that, in almost every case where any rule has been given on the subject, it has been modified and explained to meet the facts of the particular case, or to carry out the personal views of the judge on the matter of insanity.

"But there are not wanting cases where all tests have been discarded. In *State* v. *Felter*, 25 Iowa, 67, Dillon, Ch. J., says: 'The jury, in substance, should be told that if the defendant's act in taking the life of his wife was caused by mental disease or unsoundness which dethroned his reason and judgment with respect to that act, which destroyed his power rationally to comprehend the nature and consequences of that act, and which, overpowering his will, irresistibly forced him to its commission, then he is not amenable to legal punishment. But if the jury believe, from all the evidence and circumstances, that the defendant was in possession of a rational intellect or sound mind, and allowed his passions to escape control, then, though passion may for the time being have driven reason from her seat and usurped it, and have urged the defendant with a force at the moment irresistible to desperate acts, he cannot claim for such acts the protection of insanity."

"And in *Stevens* v. *State* (1870), reported in 9 Am. L. Reg. N. S. 530, which was an indictment for murder, and the defense insanity, an instruction to the jury, that if they believed the defendant knew the difference between right and wrong in respect to the act in question, if he was conscious that such act was one which he ought not to do, he was responsible, was held erroneous.

"In the course of his opinion in that case, Gregory, J., speaking of the charge in *Com.* v. *Rogers*, 7 Met. 500, 41 Am. Dec.

458, said: 'The charge is by no means clear, and we think that it is not entitled to the weight usually awarded to it.'

"Very much to the same effect was *State* v. *Spencer*, 21 N. J. L. 196. Hornblower, Ch. J., said: 'In my judgment, the true question to be put to the jury is, whether the prisoner was insane at the time of committing the act; and in answer to that question, there is little danger of a jury's giving a negative answer, and convicting a prisoner who is proved to be insane on the subject-matter relating to or connected with the criminal act, or proved to be so far or so generally deranged as to render it difficult, or almost impossible, to discriminate between his sane or his insane acts.'

"And, also, a case said to have been tried in York county, Maine, in 1836, where the court charged the jury that if they were satisfied the prisoner was not of sound memory and discretion at the time of committing the act, they were bound to return a verdict of acquittal. Ray, Medical Jurisprudence, § 42. To the same effect also are our own cases of *Prescott* and *Cory*, referred to by the attorney general in his brief.

"Professor Greenleaf adopts the charge of Chief Justice Shaw, in *Roger's Case*, without any attempt at modification or explanation, as covering the whole subject, so far as criminal responsibility is concerned. 2 Greenl. Ev. § 372.

"Mr. Bishop undertakes to give the forms in which courts have put the question of insanity to the jury in most of the modern cases. 1 Bishop, Crim. Law, § 475. But I have not been able to find a case, ancient or modern, where the judge did actually give the question of insanity to the jury in just the terms of Mr. Bishop's form, and he says, speaking of his rule: 'This form of stating the question of insanity to the jury is well in cases where it is admitted that the mental disease or imperfection extends only to the intellectual power, and the party has full control of his actions. How numerous comparatively these cases are, is matter of science and fact nowhere to be discussed.' 1 Bishop, Crim. Law, § 478.

"In regard to the difficulties of the subject, the same author says: 'The labors of writers on insanity have been exhausted in attempts to find some test of ready application to determine when a person is to be deemed insane, and when not, in reference to his

responsibility for crime. And judges, less informed on this subject than on most other subjects of legal science, have struggled under the inherent embarrassments of the question itself, under the influence of erroneous notions in the community, and under the failures of counsel and witnesses in particular cases to present the real points of inquiry. The result has been, that instructions given in reference to particular facts appearing in the cases before them have seemed, to casual observers, to be very discordant, while to scientific inquirers after the facts of insanity, they have seemed very absurd.' 1 Bishop, Crim. Law, § 474. And in a note: 'It seems to me there has been too much attempt to do what is possible regarding the matter. It is not, I submit, possible, in the nature of things, that the court should find an exact and literal rule which may be put into the hand of a juryman, wherewith to measure the mind, and determine whether it is criminally responsible or not for its act.'

"It is to be remarked that the same thing, in substance, was admitted by the judges in *McNaghten's Case*, 10 Clark & F. 200. Tindal, Ch. J., giving the opinion of the majority, said: 'They have forborne entering into any particular discussions upon these questions, from the extreme and almost insuperable difficulty of applying those answers to cases in which the facts are not brought judicially before them. The facts of each particular case must of necessity present themselves with endless variety, and with every shade of difference in each case; . . . and they deem it at once impracticable, and at the same time dangerous to the administration of justice, if it were practicable, to attempt to make minute applications to the principles involved in the answers given by them to your lordships' questions.'

"Maule, J., speaking for himself, observed: 'I feel great difficulty in answering the questions put by your Lordships on this occasion: First, because they do not appear to rise out of, and are not put in reference to, a particular case, or for a particular purpose, which might explain or limit the generality of their terms, so that full answers to them ought to be applicable to every possible state of facts not inconsistent with those assumed in the questions.'

"It is entirely obvious that a court of law undertaking to lay down an abstract general proposition, which may be given to the

jury in all cases, by which they are to determine whether the prisoner had capacity to entertain a criminal intent, stands in exactly the same position as that occupied by the English judges in attempting to answer the questions propounded to them by the House of Lords in this case; and whenever such an attempt is made, I think it must always be attended with failure, because it is an attempt to find what does not exist, namely, a rule of law wherewith to solve a question of fact.

"This is the only conclusion I desire to draw from the cases and text-writers referred to. It is clear to me that judges have adapted their language to the facts of the particular case before them, and that when anything is said about knowledge of right and wrong, or knowledge of the quality of the act, or any other legal test, it has been, and will inevitably continue to be, qualified and explained in such a way, to meet the evidence upon which the jury are to pass, that its character as a rule entirely disappears.

"No one but the Creator of all things can look in upon the chaos of a disordered mind, and determine with certainty whether its powers are so much prostrated, enfeebled, or deranged that the unhappy sufferer has ceased to be an accountable being. Still the court and jury must determine that question, approximately, as best they can in each individual case; and it makes no difference, so far as I can see, with the difficulty of the subject, whether Lord Brougham's view, that a distinction is to be made between the moral accountability of a man to his Maker and his accountability to human tribunals, be accepted or not. With this duty to perform, and this responsibility upon them, courts naturally and properly turn to men of science, such as have had large experience in the care and treatment of the insane, for aid; and the questions allowed to be put to experts and answered by them, both in England and this country, show that what is laid down as law in theory, is almost universally treated as fact in practice.

"At the trial where insanity is set up as a defense, two questions are presented: First, Had the prisoner a mental disease? Second, If he had, was the disease of such a character, or was it so far developed, or had it so far subjugated the powers of the mind as to take away the capacity to form or entertain a criminal intent? The first is so purely a question of fact, that no one would think

of disputing it any sooner than he would dispute that it was a question of fact whether a man has consumption or not. It is in settling the second that all the difficulty arises.

"The instructions asked for in this case go upon the ground that this is a mixed question of law and fact; that where there is delusion there can be no criminal intent; and that where there is capacity to know right from wrong in reference to the particular act, there is capacity to commit crime. It is true, the sixth request does not present the matter in just this form; but if knowledge of right and wrong as to the act is to be considered a legal test of criminal accountability, it must follow that those who have such knowledge are accountable, as well as those who have it not are not accountable. And this court is now called on, as a court of law, to decide whether either of these tests shall be adopted in this state, and if so, which.

"It would doubtless be convenient to adopt some such test. It would, to some extent, save the trouble of trying each case, as it arises, on its own special and peculiar facts; at any rate, it would narrow the range of investigation to a search for the facts constituting the test adopted. But in cases of this sort the argument of convenience is not to be admitted. No formal rule can be applied in settling questions which have relation to liberty and life, merely because it will lessen the labor of the court or jury. Nor ought such a rule to be adopted upon the authority of cases, unless those cases show, beyond a doubt, not only its existence, but that it is founded in reason and fundamental truth. Expressions of even the most eminent judges must not be mistaken for the enunciation of a universal principle of law, when it appears that they were used in charging the jury upon the facts arising in a particular case.

"The instructions given also imply that this is a mixed question of law and fact; that the only element of law which enters into it is that no man shall be held accountable, criminally, for an act which was the offspring and product of mental disease. Of the soundness of this proposition there can be no doubt. Thus far all are agreed, and the doctrine rests upon principles of reason, humanity, and justice, too firm and too deeply rooted to be shaken by any narrow rule that might be adopted on the subject. No argument is needed to show that to hold that a man

may be punished for what is the offspring of disease would be to hold that he may be punished for disease. Any rule which makes that possible cannot be law.

"It will hardly be contended, I suppose, that delusion, or knowledge of right and wrong, with reference to the act, or any other thing, can, with any degree of propriety, be called a legal test of the mental capacity to commit crime, unless that capacity is determined absolutely, in all cases, by the presence or absence of the fact which is assumed to constitute the test.

"If we speak of delusion, for instance, before that can be adopted as the test, in the sense intended by the request in this case, it must appear that it makes no difference whether the delusion has any reference to or connection with the act or not. If we say, as Erskine said in *Hadfield's Case*, 27 How. St. Tr. 1282, that delusion is the test when it appears to have produced the act, but not when it does not appear to have produced the act,—that the delusion and the act should be connected,—we admit that delusion cannot be a legal test, because it is not a universal test.

"And even if it were established that, in all cases where there is delusion, there is not capacity to commit crime with as much certainty as that a heavy body left free in the air will fall to the earth, it still remains a fact. That a heavy body will fall is a fact, although it is at the same time a law of nature; that delusion attends incapacity for crime would be a fact still, although were the fact ascertained to be certain and universal, it might be called a law of mental disease, and might, therefore, be given to the jury as a criterion, without any positive or practical wrong.

"Yet, in that view it would be the law of the land in no other sense than the laws of nature and physics may be considered laws of the land. Now this court, sitting for the decision of questions of law, is not at liberty to receive and consider evidence, or weigh and determine matters of fact.

"But the very first step in the inquiry to ascertain if there be any test or criterion that may be safely given to the jury on the subject, whether as a fact universally true, or as a principle of law, involves the examination of an immense mass of evidence, as complicated and difficult to understand as can well be conceived. Moreover it would require a degree of skill and scientific attain-

ment which could only be reached by years of special study and intelligent observation. Not only ought all the facts bearing on the question to be collected from every asylum for the insane throughout the world, but, as an inflexible rule is to be established, the facts of all other cases, where the patient has never received scientific treatment, ought to be added to the stock. Then, after collecting the facts in this way, it would be necessary to compare cases and classes of cases one with the other, to weigh facts against facts, to balance theories and opinions, and finally to deduce a result which might itself turn out to be nothing more than a theory or opinion after all. At any rate it would be a deduction of fact.

"It need not be said that this is not the business of a court of law. It is a work which can only be reasonably well done by men who devote their lives exclusively to its accomplishment. Such a work has doubtless been done, with extraordinary patience and ability, by our distinguished countryman, Dr. Ray; and the result of his laborious investigation is, that no test can be found. He says: 'By persons practically acquainted with the operations of the insane mind, to such it is well known that in every hospital for the insane are patients capable of distinguishing between right and wrong, knowing well enough how to appreciate the nature and legal consequences of their acts, acknowledging the sanctities of religion, and never acting from irresistible impulse, but deliberately and shrewdly.' Ray, Medical Jurisprudence, § 43.

"If we were at liberty to weigh and consider evidence upon the question, it is clear that such testimony must outweigh all the convenient formulas and arbitrary dogmas laid down by lawyers and judges from the time of Lord Hale to the present, simply for the reason that Dr. Ray is qualified by study and observation to give an opinion, while lawyers and judges are not. But we do not consider evidence upon this point at all; whether there is any universal test is as clearly a pure matter of fact, as is the question what that test may be.

"A strong argument in favor of the instructions given in this case, and of consequence against proceeding further to give the specific instructions requested, is found both upon principle and authority, in the course of decisions where testamentary capacity has been before the courts.

"In the well-known leading case of *Dew* v. *Clark*, 3 Add. Eccl. Rep. 79, decided in 1826, Sir John Nicholl gave his opinion thus: 'The true criterion—the true test—of the absence or presence of insanity, I take to be, the absence or presence of what, used in a certain sense of it, is comprisable in a single term, namely, "delusion." Wherever the patient once conceives something extravagant to exist, which has still no existence whatever but in his own heated imagination; and wherever at the same time, having once so conceived, he is incapable of being, or, at least, of being permanently, reasoned out of that conception,—such patient is said to be under a delusion, in a peculiar half-technical sense of the term; and the absence or presence of the delusion, so understood, forms, in my judgment, the true and only test or criterion of absent or present insanity. In short, I look upon delusion, in this sense of it, and insanity, to be almost, if not altogether, convertible terms; so that a patient under a delusion, so understood, on any subject or subjects, in any degree, is, for that reason, essentially mad or insane on such subject or subjects in that degree.'

"After a very extended review of the evidence in the case, he draws this conclusion: 'The will propounded in this cause, a will virtually disinheriting the daughter, being the direct, unqualified offspring of that morbid delusion, proved, I may now say without any qualification or restriction, to have been ever present to the mind of the deceased as to the character and conduct of his daughter,—being, if I may so term it, the very creature of that morbid delusion, put into act and energy,—I, at least, can arrive at no other conclusion, than that the deceased was insane at the time of his making the will propounded in this cause; and, consequently, that that will itself is null and void in law.'

"In view of this explicit avowal, it may be considered somewhat remarkable that this case should have been regarded as an authority for anything more than this—that delusion is the test of testamentary capacity, so far that a disposition of property by a will, which is shown to have been the direct, unqualified offspring of morbid delusion, cannot be upheld. If a morbid delusion produced the act, then the act is not valid. But, whether through a misconception of this case, or by adopting the theory of some writers who maintain that the mind, though it has varied

faculties, is one and indivisible, so that if it be disordered in any one of these faculties it cannot be said to be sound, though its other faculties and functions remain undisturbed, a doctrine appears to have gained some currency in England to the effect that delusion on any matter, however remote from the subject of the will, and however disconnected from it, is conclusive evidence of unsoundness of mind, and therefore altogether destroys testamentary capacity. *Waring* v. *Waring*, 6 Moore, P. C. 341. And see also *Smith* v. *Tebbitt*, L. R. 1 Prob. & Div. 398.

"This idea was attacked and completely overthrown in the case of *Banks* v. *Goodfellow*, L. R. 5 Q. B. 549, decided in July, 1870.

"In that case it appeared that a testator labored under two fixed delusions: one that he was pursued by spirits; the other, that a man, long since dead, came to molest him—neither delusion influencing or calculated to influence the particular testamentary disposition made by him. Brett, J., who tried the case, left it with the jury to say whether, at the time of the making of the will, the testator was capable of such knowledge and appreciation of facts, and was so far master of his intentions and free from delusions, as would enable him to have a will of his own in the disposition of his property, and act upon it.

"It will be observed that if a delusion were to be regarded as a universal legal test, there was no question here to be submitted to the jury; a verdict should have been ordered against the will, for the existence of delusions was not disputed. But the instructions were held correct, and Lord Chief Justice Cockburn, in the course of his elaborate opinion, says: 'Everyone must be conscious that the faculties and functions of the mind are various and distinct, as are the powers and functions of our physical organization. The senses, the instincts, the affections, the passions, the moral qualities, the will, perception, thought, reason, imagination, memory, are so many distinct faculties or functions of the mind. The pathology of mental disease, and the experience of insanity in its various forms, teach us that while, on the one hand, all the faculties, moral and intellectual, may be involved in one common ruin, as in the case of a raving maniac, in other instances one or more only of these faculties or functions may be disordered while the rest are left unimpaired and undisturbed,—

that while the mind may be overpowered by delusions which utterly demoralize it and unfit it for the perception of the true nature of surrounding things, or for the discharge of the common obligations of life, there often are, on the other hand, delusions which, though the offspring of mental disease, . . . leave the individual in all other respects rational, and capable of transacting the ordinary affairs, and fulfilling the duties and obligations incidental to the various relations of life.'

"The exact question presented to the court in this case, namely, whether unsoundness, not operating on the mind of the testator in regard to the particular testamentary disposition, will be sufficient to deprive him of the power of disposing of his property by will, was said to be a new question, not before presented for judicial decision in England.

"But in *Boardman* v. *Woodman*, 47 N. H. 120, decided four years earlier in this state, the court below, Bartlett, J., charged the jury 'that the mere fact of the possession of a delusion may not be sufficient to render a person utterly incapable of making a valid will; that a person of sufficient mental capacity, though under a delusion, may make a valid will; if the will is in no way the offspring of the delusion, it is unaffected by it.'

"This instruction was sustained, and I am unable to find anything in the opinion of the court that conflicts with the doctrine of *Banks* v. *Goodfellow*, L. R. 5 Q. B. 549. Sargent, J., in the course of his opinion says: 'Delusion in the technical sense, as explained by Sir John Nicholl and others, is, then, the legal test of the presence of active insanity, and if the will is the offspring of this delusion, it should be set aside.'

"It is sufficiently obvious that neither Sir John Nicholl nor Judge Sargent would hold that a man who labors under a delusion that his legs are made of glass, or that he is charged with controlling the motions of the planetary system, but is in other respects sane, would therefore be incapable of making a valid will.

"It is not necessary here to express any assent to or dissent from the manner in which the subject is treated in *Dew* v. *Clark*, 3 Add. Eccl. Rep. 79, and *Boardman* v. *Woodman*, 47 N. H. 120. Whether the inquiry is advanced by saying that the act to be invalid must be the offspring of delusion, instead of saying that it must be the offspring of mental disease, is a matter which

does not concern this argument. See remarks of Lord Penzance in *Smith* v. *Tebbitt*, L. R. 1 Prob. Div. 398. If the doctrine of *Banks* v. *Goodfellow*, L. R. 5 Q. B. 549, and *Boardman* v. *Woodman*, *supra*, be applied in the case under consideration, it would clearly have been error to give the instruction as to delusion requested by defendant's counsel; because delusion cannot be a legal test, if while delusions exist in the mind an act no way connected with such delusions nor produced by them is to be held valid.

"How far the analogy holds between testamentary capacity and capacity to commit crime, it is not necessary to inquire, because delusion has never, so far as I can find, been regarded as a test in criminal cases, unless *Hadfield's Case*, 27 How. St. Tr. 1282, is to be excepted; and all the argument requires is, to show that the rule, which it has been thought may be drawn from the authorities in civil cases, has no existence, event here, in the broad and universal terms in which the court was requested to apply it on the trial of this case.

"Fortunately we are not embarrassed by any decisions, or, so far as I know, any *dicta* or expressions of single judges in this state, at variance with the broad philosophical doctrine laid down by the judges who tried this case. Indeed, there seems to have been a strong leaning heretofore in the same general direction, as is shown by the quotations from charges of two of our late chief justices, Richardson and Bell, in the brief of the attorney general for the state.

"In view of these considerations, we are led to the conclusion that the instruction given to the jury in this case, that 'if the defendant killed his wife in a manner that would be criminal and unlawful if the defendant were sane, that verdict should be, "not guilty by reason of insanity;" if the killing was the offspring or product of mental disease in the defendant,' was right; that it fully covers the only general, universal element of law involved in the inquiry; and therefore, that any further step in the direction indicated by the requests would have been an interference with the province of the jury, and the enunciation of a proposition which in its essence is not law, and which could not in any view safely be given to the jury as a rule for their guidance, because for aught we can know it might have been false in fact.

"This would seem to dispose of the whole case. All the other instructions given are only the direct logical consequence of this principle.

"Whether the defendant had a mental disease, as before remarked, seems to be as much a question of fact as whether he had a bodily disease; and whether the killing of his wife was the product of that disease was also as clearly a matter of fact as whether thirst and a quickened pulse are the product of fever. That it is a difficult question does not change the matter at all. The difficulty is intrinsic, and must be met from whatever direction it may be approached. Enough has already been said as to the use of symptoms, phases, or manifestations of the disease as legal tests of capacity to entertain a criminal intent. They are all clearly matters of evidence, to be weighed by the jury upon the question whether the act was the offspring of insanity; if it was, a criminal intent did not produce it; if it was not, a criminal intent did produce it and it was crime.

"The instructions as to insane impulse seem to be quite correct and entirely within the same principle. If the defendant had an insane impulse to kill his wife, which he could not control, then mental disease produced the act. If he could have controlled it, then his will must have assented to the act, and it was not caused by disease, but by the concurrence of his will, and was therefore crime.

These instructions have now been twice given to the jury in capital cases in this state—first, by Chief Justice Perley, in *State* v. *Pike*, 49 N. H. 399, 6 Am. Rep. 533, and now again by Judge Doe, in the case before us. In *State* v. *Pike* no exceptions were taken to this part of the charge, and the questions here raised were not before the whole court for judicial determination, although they were printed in the case as transferred, and no objection to their form is understood to have been made.

"But a question was passed upon in that case which, carried to its logical results, goes far toward settling most of the questions raised upon the instructions here. It was claimed that the defendant was irresponsible by reason of a species of insanity called dipsomania. The court instructed the jury 'that whether there is such a mental disease as dipsomania, and whether the defendant had that disease, and whether the killing of Brown was the

product of such disease, were questions of fact for the jury.' These instructions were specially excepted to by the defendant, and were held correct. This would seem to be entirely inconsistent with the idea that either delusion or knowledge of right and wrong is, as matter of law, a test of criminal capacity; and would also seem to be about equivalent to holding, in general terms, that it was for the jury to say whether the killing was the product of mental disease, and return their verdict of 'guilty' or 'not guilty by reason of insanity' as they found that fact to be.

"We should be slow to establish any doctrine on this important subject, which we could see would be likely to result in the escape of malefactors from punishment, or afford encouragement to a fictitious defense of insanity; and no considerations of convenience or ease in the administration of the law, as before observed, should be allowed to weigh at all against adhering to any doctrine or any course of practice that rests upon sound reason, or that appears to be necessary for the attainment of right results, whether such doctrine or practice is supported by uniform authority or not.

"Still, it is no objection to the course of the judges who tried this case and who tried *Pike's Case*, that it relieves the subject of some of its most formidable difficulties as far as the court is concerned, and at the same time furnishes at least one clear and explicit direction which the jury can understand.

"No untried or doubtful theory is adopted. The instruction given was always law, and always must be law, while justice is administered upon principles at all consonant with the calls of civilization and humanity. The only objection is, that the court did not go further, and undertake to explore a region where all is doubt, uncertainty, and confusion upon the authorities, and where, upon principle, they had no right to go at all; that they did not undertake to lay down a rule where, if we could allow ourselves to investigate the fact, we should probably find there is and can be no rule, nor to enunciate as law a pure matter of fact which can only be absolutely known to the Almighty.

"I may add that it confirms me in the belief that we are right, or at least have taken a step in the right direction, to know that the view embodied in this charge meets the approval of men who, from great experience in the treatment of the insane, as well as

careful and long study of the phenomena of mental disease, are infinitely better qualified to judge in the matter than any court or lawyer can be. See Ray, Medical Jurisprudence, 5th ed. § 44.

"The satisfaction with which the charge to the jury in *State* v. *Pike*, 49 N. H. 399, 6 Am. Rep. 533, is understood to have been received by the most enlightened members of the medical profession proves to my mind, not that we have thrown down old landmarks to adopt any theory based on a partial, imperfect, or visionary view of the subject, but that in a matter where we must inevitably rely to a great extent upon the facts of science, we have consented to receive those facts as developed and ascertained by the researches and observations of our own day, instead of adhering blindly to dogmas which were accepted as facts of science and erroneously promulgated as principles of law fifty or a hundred years ago.

"The last instruction, that the defendant was to be acquitted on the ground of insanity unless the jury were satisfied beyond a reasonable doubt that the killing was not produced by mental disease, was in accordance with *State* v. *Bartlett*, 43 N. H. 224, 80 Am. Dec. 154, and was correct. *Exceptions overruled.*"

§ 9. *Time of application of tests.*

All of the cases agree that the tests as to the existence of insanity as a defense to a criminal accusation are to be applied with reference to the exacttime of the commission of the offense.[1] But it is proper in a prosecution for homicide by poisoning to submit to the jury the question of the sanity or insanity of the accused at the time when the poison was purchased, as well as at the time when it was administered.[2]

§ 10. *Insanity as affecting the degree of crime.*

The general rule is that there is no condition intermediate between sanity or insanity, which may mitigate crime while not

[1] See cases with relation to tests, above cited. And see also State v. Coleman, 27 La. Ann. 691; State v. Hays, 22 La. Ann. 39; State v. Pratt, 1 Houst. Crim. Cas. 249; People v. Clendennin, 91 Cal. 35; Clark v. State, 8 Tex. App. 350; Smith v. State, 22 Tex. App. 317.

[2] Laros v. Com. 84 Pa. 200.

excusing it.[1] A conviction of a lower degree cannot be had on the theory that the defendant's mind was unsound to a degree rendering him incapable of deliberation, where he knew the nature of the act.[2] Thus, where a person charged with murder was capable of knowing that the act was wrong, a partial defect of understanding which might cause him more readily to give away to passion than an ordinarily reasonable man cannot be considered for the purpose of reducing the offense to manslaughter, the provocation must at least be such as to stir the resentment of a reasonable man.[3] And an instruction that if the accused was not in a frame of mind to deliberate and premeditate, the killing would not be murder, is objectionable as vague and ambiguous, and not showing the measure of criminal responsibility.[4] But evidence of insanity is admissible to show the absence of any deliberative or premeditative design,[5] and an instruction that if the accused acted with malice he is guilty of murder though he may have labored under partial insanity is erroneous, as there can be no such thing as malice without mental accountability, and this cannot coexist with incapacity to distinguish right and wrong.[6] And an instruction that if the accused was insane at the time the jury must declare him not guilty, without regard to the degree of insanity, is too broad and cannot be sustained as a proposition of law.[7] But it has been held that one whose mind was so far impaired as to render him incapable of a deliberate, premeditated murder, but who was not totally irresponsible by reason of insanity, should be convicted of murder in the second degree only,[8] and that moral insanity should be considered in determining the

[1] Sage v. State, 91 Ind. 141; United States v. Lee, 4 Mackey, 489, 54 Am. Rep. 293; State v. Kotovsky, 11 Mo. App. 584; Sindram v. People, 1 N. Y. Crim. Rep. 448.

[2] State v. Kotovsky, 11 Mo. App. 584.

[3] People v. Hurtado, 63 Cal. 288.

[4] Dejarnette v. Com. 75 Va. 867.

[5] Sindram v. People, 1 N. Y. Crim. Rep. 448; Sage v. State, 91 Ind. 141.

[6] Grissom v. State, 62 Miss. 167.

[7] People v. Best, 39 Cal. 690.

[8] Anderson v. State, 43 Conn. 514, 21 Am. Rep. 669; Cottell v. State, 12 Ohio, C. C. 467, 5 Ohio Dec. 472; Green v. Com. 83 Pa. 75; Pistorius v. Com. 84 Pa. 158; Willis v. Com. 32 Gratt. 928.

degree of the offense;[1] and that evidence of excitement and abnormal sensitiveness resulting from sunstroke and a fall and other accidents, though not sufficient to establish irresponsibility, will reduce the crime from murder in the first degree to murder in the second degree.[2] So, an instruction that if the defendant was not insane at the time of the shooting he ought to be found guilty as charged in the indictment, is not subject to the objection that it precluded the jury from finding a lesser degree of the offense where the shooting was admitted.[3] And an instruction with reference to murder in the second degree is not reversible error where the homicide was murder in the first degree, if the accused was not insane, as such an instruction would be clearly beneficial to the accused.[4] But where a person committing a homicide was conscious of what he was doing and capable of distinguishing between right and wrong, and meditated upon the purpose of committing the act, he must be found guilty of murder in the first degree though he was deranged.[5]

II. Partial Insanity.

§ 1. *Definitions.*

Partial insanity is defined to be mental unsoundness always existing, although occasionally manifested,—monomania.[6] And monomania is defined as a derangement of the mental faculties confined to some particular idea or object of desire or aversion;[7] a perversion of the understanding in regard to a single object or a small number of objects, with a predominance of mental excitement.[8] A person may be insane upon one subject and yet sane

[1] Anderson v. State, 43 Conn. 514, 21 Am. Rep. 664. And see Jones v. Com. 75 Pa. 403.

[2] People v. Conroy, 33 Hun, 119.

[3] People v. Hobson, 17 Cal. 424.

[4] Boren v. State, 32 Tex. Crim. Rep. 637.

[5] Nevling v. Com. 98 Pa. 323.

For Dr. Clevenger's discussion on this subject, see, *Deliberation, Premeditation, Degree of Crime, Degree of Insanity, Mitigation, Malice, Responsibility, Head Injury, Homicide, Tests of Insanity.*

[6] Black, Law Dict. citing 3 Add. 79.

[7] Owing's Case, 1 Bland, Ch. 370, 17 Am. Dec. 311.

[8] Re Gannon's Will (C. P.) 3 Misc. 329.

upon all others,[1] and the presence of the power of consecutive and rational thought does not disprove the existence of insanity.[2]

§ 2. *Test of criminal responsibility.*

One may be partially insane and yet responsible for his criminal acts.[3] Partial insanity does not confer criminal irresponsibility where the party was not instigated by his madness to perpetrate the criminal act.[4] Partial insanity on other subjects does not excuse or justify the commission of crime.[5] Where it is relied upon as a defense, the crime charged must have been the product of an insane condition, and connected with it as effect with cause, and not the result of sane reasoning or mere unnatural motives of which the party may be capable, notwithstanding his disorder.[6] And where a person accused of crime is not shown to have been insane generally, evidence as to unsoundness upon any subject except that which is under investigation is incompetent.[7] Partial insanity is an excuse for crime only when it deprives the party of his reason in regard to the act,[8] and takes from him the freedom of moral action.[9] The test of criminal responsibility, like that in cases of general insanity, is, Had the accused sufficient capacity at the time of committing the act to distinguish between right and wrong with reference to it?[10] And

[1] Cutler v. Zollinger, 117 Mo. 92.

[2] Com. v. Meredith, 17 Phila. 90; Bennett v. State (Wis.) 4 Crim. L. Mag. 378.

However apparently convenient may be the legal use of the expression "partial insanity," alienists claim that it has led to serious misconceptions. S. V. C.

[3] State v. Pagels, 92 Mo. 300; State v. Harrison, 36 W. Va. 729, 18 L. R. A. 224.

[4] Bovard v. State, 30 Miss. 600; Com. v. Werling, 164 Pa. 559.

[5] State v. Spencer, 21 N. J. L. 196; Com. v. McCaulley, 16 Phila. 502.

[6] Guiteau's Case, 10 Fed. Rep. 161; Stevens v. State, 31 Ind. 485, 99 Am. Dec. 634; Parsons v. State, 81 Ala. 577, 60 Am. Rep. 193.

[7] Com. v. McCaulley, 16 Phila. 502.

[8] Freeman v. People, 4 Denio, 9, 46 Am. Dec. 216; State v. Danby, 1 Houst. Crim. Rep. 175; State v. Pratt, 1 Houst. Crim. Rep. 249.

[9] Com. v. McCaulley, 16 Phila. 502.

[10] State v. Pratt, 1 Houst. Crim. Rep. 249; People v. Hurtado, 63 Cal. 288; State v. Nixon, 32 Kan. 205; Grissom v. State, 62 Miss. 167; Giebel v. State, 28 Tex. App. 151; State v. Harrison, 36 W. Va. 729, 18 L. R. A. 224; United States v. Ridgeway, 31 Fed. Rep. 144; Trial of Kinloch, 25 How. St. Tr. 891, 997.

partial insanity will not excuse unless the accused did not have such knowledge,[1] or did not know the nature or quality of the act,[2] or unless he had not power sufficient to apply such knowledge to his own case.[3] And some of the cases have also held that he must have will power sufficient to restrain the impulse to commit crime which may arise from a diseased mind;[4] and that partial insanity which will excuse crime must control the will and make the commission of the act a duty of overruling necessity.[5] But where partial insanity goes to the extent of breaking down the distinction between a knowledge of right and wrong as to the particular act, it is immaterial whether the sufferer be insane as to other matters or not.[6] And partial insanity, leaving one committing a homicide without power to deliberate or premeditate, will reduce the offense to murder in the second degree.[7]

Under the Indiana statutory defense of mental unsoundness, however, it cannot be said that a man may be partially insane and not wholly so,[8] and partial insanity is not a defense in a criminal prosecution, the mental capacity of the accused, whether weak or strong, not affecting the question of punishment, unless it is determined that he is insane within the meaning of the law.[9]

[1] State v. Lawrence, 57 Me. 574; State v. Huting, 21 Mo. 464; Bovard v. State, 30 Miss. 600; People v. Taylor, 138 N. Y. 398; Com. v. Sayres, 12 Phila. 553; Com. v. Freeth, 5 Pa. L. J. 445; Dejarnette v. Com. 75 Va. 867; State v. Harrison, 36 W. Va. 729, 18 L. R. A. 224; United States v. Holmes, 1 Cliff. 98.

[2] State v. Lawrence, 57 Me. 574; People v. Taylor, 138 N. Y. 398; Com. v. Sayres, 12 Phila. 533; Com. v. Freeth, 5 Pa. L. J. 445; Dejarnette v. Com. 75 Va. 867; State v. Harrison, 36 W. Va. 729, 18 L. R. A. 224; United States v. Holmes, 1 Cliff. 98.

[3] Com. v. Sayres, 12 Phila. 533; Com. v. Freeth, 5 Pa. L. J. 445; Dejarnette v. Com. 75 Va. 867; United States v. Holmes, 1 Cliff. 98.

[4] Dejarnette v. Com. 75 Va. 867; Com. v. Winnemore, 1 Brewst. 356.

[5] Com. v. Mosler, 4 Pa. 256; Com. v. Freeth, 5 Pa. L. J. 455. As to *Moral insanity* and *Uncontrollable impulse*, see §§ 5–7, *infra*.

[6] Grissom v. State, 62 Miss. 167.

[7] Cottell v. State, 12 Ohio, C. C. 467, 5 Ohio Dec. 472.

[8] Walker v. State, 102 Ind. 502.

[9] Warner v. State, 114 Ind. 137.

For Dr. Clevenger's discussion of this subject, see *Remissions, Lucid Intervals, Monomania, Paranoia, Responsibility, Will Power, Impulse, Control.*

§ 3. *Delusions—definition and nature.*

An insane delusion within the meaning of the criminal law is an unreasonable and incorrigible belief in the existence of facts which are either impossible absolutely, or impossible under the circumstances of the individual;[1] a fixed belief which is contrary to universal experience and known natural laws;[2] a belief in the existence of facts in which no rational person would believe.[3] Delusions which will affect criminal responsibility, however, are delusions of the senses, or such as relate to facts or objects, and not mere wrong notions or impressions of a moral nature; the aberration must be mental, not moral.[4] And an instruction with relation to delusions as an excuse for crime should distinguish between those which are and which are not insanity proper.[5] A belief in spirits, and that spirits whispered to the accused and bade him do a criminal act, of itself furnishes no defense, but may be evidence for the jury upon which to base its judgment with regard to his understanding and comprehension.[6] And the commission of a homicide for the purpose of being hanged shows a morbid state of mind only, and not an insane delusion which will relieve from criminal responsibility.[7] So, a common feature of delusion is a belief on the part of the person that he is perfectly sane, and his assertion that he is so is not conclusive against him.[8] And a belief on the part of the accused that he had not slept for eight years is an insane delusion on that subject.[9] A belief founded upon reason and reflection, however, is not an insane delusion, however absurd it may be.[10] The use of the word "delusion" in an instruction in a criminal action in which insanity was interposed as a defense when partial insanity is meant, the

[1] State v. Lewis, 20 Nev. 333; Guiteau's Case, 10 Fed. Rep. 161.

[2] Com. v. Meredith, 14 W. N. C. 188.

[3] Com. v. Meredith, 17 Phila. 90.

[4] Reg. v. Burton, 3 Fost. & F. 772; Reg. v. Townley, 3 Fost. & F. 839; State v. Pike, 49 N. H. 399, 6 Am. Rep. 533; Willis v. People, 5 Park. Crim. Rep. 621.

[5] Gunter v. State, 83 Ala. 96.

[6] People v. Waltz, 50 How. Pr. 204.

[7] Reg. v. Burton, 3 Fost. & F. 772.

[8] State v. Reidell, 9 Houst. 470.

[9] United States v. King, 34 Fed. Rep. 302.

[10] Guiteau's Case, 10 Fed. Rep. 161.

word "delusion" having no particular application to the facts of the case, will not be deemed to have misled the jury where the evidence and the connection in which the word was used make the meaning clear.[1]

§ 4. *Delusions—effect on criminal responsibility.*

One who is led to the commission of a criminal act by an insane delusion controlling his will and judgment is not criminally responsible therefor,[2] the question for the jury in a prosecution therefor being, Did he do the act under a delusion believing it to be other than it was?[3] and the test of criminal responsibility being the capacity to distinguish between right and wrong at the time of the commission of the act and in respect thereto, and the absence of insane delusions with reference to that subject.[4] One who commits a crime under the impulse of an insane delusion is punishable if he knew at the time that it was wrong and that he was acting contrary to law.[5] The mere existence of an insane delusion is no defense unless it renders the person incapable of knowing what he was doing or of forming a criminal intent.[6] And a person committing an offense under the influence of an insane delusion is responsible therefor where the delusion was only partial.[7] The question as to the existence of an insane delusion is important only as it throws light upon the question of the knowledge or capacity of the party to know right from wrong,[8] though he is not responsible where the delusion is such that he did not know the nature and consequences of his act, and that it was either wrong or unlawful.[9]

[1] People v. Schmitt, 106 Cal. 48.

[2] Stevens v. State, 31 Ind. 486, 99 Am. Dec. 634; Reg. v. Townley, 3 Fost. & F. 839.

[3] Reg. v. Townley, 3 Fost. & F. 839.

[4] Casey v. People, 31 Hun, 158.

[5] State v. Mewherter, 46 Iowa, 88; Fouts v. State, 4 G. Greene, 500; State v. Murray, 11 Or. 413; Wilcox v. State, 94 Tenn. 106; Bellingham's Case, 1 Collinson, Lunacy, 636.

[6] Hall v. Com. 22 W. N. C. 25.

[7] Humphreys v. State, 45 Ga. 190.

[8] Guiteau's Case, 10 Fed. Rep. 161.

[9] Parsons v. State, 81 Ala. 577, 6 Am. Rep. 193; People v. Pine, 2 Barb. 566; Reg. v. Townley, 3 Fost. & F. 839.

So the fact that a person has an insane delusion upon one subject does not affect his responsibility for a crime with reference to some other matter not connected with that particular delusion,[1] if he is capable of distinguishing between right and wrong as applied to the criminal act.[2] Delusion is not a legal test of insanity as an excuse for a criminal act where the act is in no way connected with the delusion or produced by it.[3] And it is not every delusion, though relating to the particular subject, which will relieve from criminal responsibility; a party laboring under a particular delusion must be considered in the same situation with relation to criminal responsibility as if the facts in respect to which the delusion exists were real.[4] And criminal responsibility is relieved only when the facts or state of facts believed in under the influence of the delusion would, if actually existing, have justified the act or rendered it excusable.[5]

Thus, one who commits a criminal act under the delusion that the Almighty has commanded him to do it is not criminally responsible.[6] Nor is one who commits a homicide under a delusion that the person killed was about to do him a great personal injury, and that he is acting in self-defense.[7] But a person is criminally responsible for an act committed while laboring under the delusion that he is redressing or avenging some injury or griev-

[1] State v. Gut, 13 Minn. 343; State v. Lawrence, 57 Me. 574; State v. Windsor, 5 Harr. (Del.) 512; Sindram v. People, 88 N. Y. 196; Com. v. Mosler, 4 Pa. 264; United States v. Ridgeway, 31 Fed. Rep. 144.

[2] State v. Windsor, 5 Harr. (Del.) 512; United States v. Ridgeway, 31 Fed. Rep. 144; Wilcox v. State, 94 Tenn. 106.

[3] State v. Jones, 50 N. H. 369, 9 Am. Rep. 242; Roberts v. State, 3 Ga. 310; Bovard v. State, 30 Miss. 600; State v. Simms, 71 Mo. 538; Howe v. State, 11 Neb. 537, 38 Am. Rep. 375.

[4] State v. Mewherter, 46 Iowa, 88; M'Naghten's Case, 10 Clark & F. 200.

[5] Boswell v. State, 63 Ala. 307, 35 Am. Rep. 20; Smith v. State, 55 Ark. 259; Fouts v. State, 4 G. Greene, 500; Com. v. Rogers, 7 Met. 500, 41 Am. Dec. 458; Cunningham v. State, 56 Miss. 269, 21 Am. Rep. 360; Thurman v. State, 32 Neb. 224; People v. Taylor, 138 N. Y. 398; Com. v. Freeth, 5 Pa. L. J. 455; Com. v. Winnemore, 1 Brewst. 356; Reg. v. Pate, Ray, Medical Jurisprudence, § 309. See also Wesley v. State, 37 Miss. 327, 75 Am. Dec. 62.

[6] Guiteau's Case, 10 Fed. Rep. 161.

[7] People v. Pine, 2 Barb. 566; People v. Taylor, 138 N. Y. 398; Reg. v. Pate, Ray, Medical Jurisprudence, § 309.

ance, or producing or obtaining some profit or public benefit,[1] or that another is exercising a malign influence over him.[2] And an insane delusion entertained by a convict that another is acting as a spy upon him, and has betrayed his plan of escape from prison, does not affect the criminal nature of his act in killing him.[3] And one who deliberately kills another in revenge for adultery with his wife is not protected by the fact that he labored under a delusion as to her character for virtue.[4] Nor is a person who kills another relieved from responsibility by a delusion that the latter was trying to marry his mother against her will, as that, if it were true would not have warranted the killing.[5] An instruction that a delusion will not absolve from guilt unless the facts if real would excuse it, though technically correct, is incomplete when it fails to tell the jury what facts would excuse.[6]

§ 5. *Moral insanity—defined.*

Moral insanity is defined to be incapacity, from disease, to control one's conduct according to one's knowledge; uncontrollable morbid impulses, disability of the will to refrain from what one knows is wrong and punishable; a morbid perversion of the affections and inclinations and temper independent of any disease or delusion operating directly upon the intellect,[7] a morbid state of the affections and passions or unsettling of the moral system, the mental faculties remaining normal and sound;[8] an irresistible impulse to commit an act coexisting with mental sanity.[9] And an irresistible impulse is a moral or homicidal insanity con-

[1] Humphreys v. State, 45 Ga. 190; M'Naghten's Case, 10 Clark & F. 200; Reg. v. Pate, Ray, Medical Jurisprudence, § 309.

[2] Reg. v. Pate, Ray, Medical Jurisprudence, § 309.

[3] People v. Taylor, 138 N. Y. 398.

[4] Hill v. State, 64 Ga. 463.

[5] Bolling v. State, 54 Ark. 588, 601.

[6] Bolling v. State, 54 Ark. 601.

For Dr. Clevenger's discussion on this subject see *Delusion, Partial Insanity, Responsibility, Definitions, Tests of Insanity*, chap. II. pp. 18 *et seq.*

[7] Abbott's Law Dictionary.

[8] Beasley v. State, 50 Ala. 149, 20 Am. Rep. 292.

[9] Boswell v. State, 63 Ala. 307, 35 Am. Rep. 20; State v. Potts, 100 N. C. 457.

sisting of an irresistible inclination to kill or commit some other offense; some unseen pressure on the mind drawing it to consequences which it sees but cannot avoid, holding it under a coercion which, while it clearly perceives the results, it is incapable of resisting.[1]

§ 6. *The rule that moral mania is not a defense.*

Moral mania by which the party may be compelled to do an act wrong in itself and criminal by a morbid irresistible impulse, as an independent state which will relieve from responsibility in the absence of any indications of disturbed reason, is not recognized in a number of the states,[2] and in England.[3] And moral insanity, or insanity of the moral feelings while a sense of right and wrong remains, does not affect criminal responsibility.[4] Under this doctrine the fact that a person was impelled by an irresistible and overwhelming impulse to commit a criminal act constitutes no defense.[5] That form of insanity in which one has capacity to

[1] Dejarnette v. Com. 75 Va. 867; Flanagan v. People, 52 N. Y. 467, 11 Am. Rep. 731.

The old term "moral insanity" has been properly abandoned. S. V. C.

For Dr. Clevenger's discussion on this subject, see *Moral Insanity, Immorality, Homicidal Impulse, Irresistible Impulse, Obsessions.*

[2] People v. Kernaghan, 72 Cal. 609; People v. McDonell, 47 Cal. 134; Evans v. Arnold, 52 Ga. 169; Fogarty v. State, 80 Ga. 450; Anderson v. State, 42 Ga. 9; Loyd v. State, 45 Ga. 57; Choice v. State, 31 Ga. 424; State v. Coleman, 27 La. Ann. 691; Spencer v. State, 69 Md. 28; Cunningham v. State, 56 Miss. 269, 21 Am. Rep. 360; State v. Miller, 111 Mo. 542; Walker v. People, 88 N. Y. 86; People v. Montgomery, 13 Abb. Pr. N. S. 207; State v. Potts, 100 N. C. 457; State v. Brandon, 8 Jones, L. 463; State v. Yarborough, 39 Kan. 581; Graves v. State, 45 N. J. L. 347, 46 Am. Rep. 778; Boswell v. State, 63 Ala. 307, 35 Am. Rep. 20; Beasley v. State, 50 Ala. 149, 20 Am. Rep. 292. These Alabama cases have been overruled. For present rule in Alabama, see next section.

[3] Reg. v. Burton, 3 Fost. & F. 772; Reg. v. Haynes, 1 Fost. & F. 666; Reg. v. Barton, 3 Cox, C. C. 275; Reg. v. Stokes, 3 Car. & K. 185; Reg. v. Pate, 1 Bennett & H. Lead. Cas. 96, Ray, Medical Jurisprudence, § 309; Reg. v. Oxford, 9 Car. & P. 525; Reg. v. Higginson, 1 Car. & K. 129; Reg. v. Layton, 4 Cox, C. C. 149; Reg. v. Townley, 3 Fost. & F. 839.

[4] Reg. v. Burton, 3 Fost. & F. 772; State v. Brandon, 8 Jones, L. 463.

[5] People v. Ward, 105 Cal. 335; Marceau v. Travelers' Ins. Co. 101 Cal. 338; Fogarty v. State, 80 Ga. 450; State v. Scott, 41 Minn. 365; People v. Mills, 98 N. Y. 176; People v. Waltz, 50 How. Pr. 204; State v. Williamson,

distinguish right from wrong, but no power to choose between them, is not recognized as a justification for a criminal act.[1] An uncontrollable impulse is not a ground of criminal irresponsibility where the perpetrator was fully conscious that his act was wrong and criminal,[2] or where he knows its nature, character, and consequences.[3] The test of criminal responsibility is not the power to refrain from doing what is known to be wrong,[4] but whether the accused at the time of committing the act knew its character and nature, and that it was a wrongful one;[5] but there is no criminal responsibility for an act committed under an uncontrollable impulse arising from mental disease which overwhelms reason, conscience, and judgment, depriving the party of power to distinguish between right and wrong.[6]

§ 7. *The contrary rule.*

The doctrine that moral insanity going to the extent of destroying free agency and moral responsibility excuses crime when established by satisfactory evidence[7] is applied by the courts of

106 Mo. 162; State v. Kotovsky, 74 Mo. 247; State v. Erb, 74 Mo. 199; State v. Pagels, 92 Mo. 300; United States v. Holmes, 1 Cliff. 98; United States v. Faulkner, 35 Fed. Rep. 730; United States v. Young, 25 Fed. Rep. 710; Huntington's Trial, 447.

[1] Flanagan v. People, 52 N. Y. 467, 11 Am. Rep. 731; Casey v. People, 31 Hun, 158, 2 N. Y. Crim. Rep. 187; People v. Waltz, 50 How. Pr. 204; People v. Carpenter, 102 N. Y. 238; People v. Montgomery, 13 Abb. Pr. N. S. 207.

[2] State v. O'Neil, 51 Kan. 651; State v. Nixon, 32 Kan. 205; State v. Mowry, 37 Kan. 369; People v. Carpenter, 102 N. Y. 238; Walker v. People, 1 N. Y. Crim. Rep. 7, 22; People v. Coleman, 1 N. Y. Crim. Rep. 1; State v. Alexander, 30 S. C. 74, 14 Am. St. Rep. 879; State v. Levelle, 34 S. C. 120; Wilcox v. State, 94 Tenn. 106; Reg. v. Haynes, 1 Fost. & F. 666.

[3] State v. Harrison, 36 W. Va. 729, 18 L. R. A. 224; People v. Clendennin, 91 Cal. 35; People v. Hoin, 62 Cal. 120, 45 Am. Rep. 651.

[4] State v. Bundy, 24 S. C. 439, 58 Am. Rep. 263.

[5] Reg. v. Barton, 3 Cox, C. C. 275; Cole's Trial, 7 Abb. Pr. N. S. 321; United States v. Faulkner, 35 Fed. Rep. 730.

Cunningham v. State, 56 Miss. 269, 21 Am. Rep. 360; Bovard v. State, 30 Miss. 600; Com. v. Rogers, 7 Met. 500, 41 Am. Dec. 458; Hart v. State, 14 Neb. 572; Burgo v. State, 26 Neb. 639; Wright v. State, 4 Neb. 407; People v. Sprague, 2 Park. Crim. Rep. 43; People v. Kleim, 1 Edm. Sel. Cas. 13; People v. Divine, 1 Edm. Sel. Cas. 594; McFarland's Trial, 8 Abb. Pr. N. S. 57; King v. State, 9 Tex. App. 515.

[7] Kriel v. Com. 5 Bush, 362; Clark v. Trail, 1 Met. (Ky.) 35; Com. v. Mosler, 4 Pa. 264. And see Anderson v. State, 43 Conn. 514, 21 Am. Rep. 669. See also cases cited *supra*, this section.

many of the states, and seems to be gaining ground. Within this doctrine insanity which so affects the mind as to subvert the freedom of the will and destroy the power of the party to choose between right and wrong relieves him from criminal responsibility for acts done under the influence of such disease, though he is able to perceive the difference between right and wrong;[1] and a charge in a criminal action in which insanity is interposed as a defense, limiting the inquiry to the condition of the cogitative faculties or power to comprehend by the understanding, is erroneous, as mental disease may also involve the will.[2]

There are two constituent elements of legal responsibility for criminal acts; first, capacity of legal discrimination, and, second, freedom of will.[3] And where one commits a crime under an insane impulse which he could not control, the act being produced by mental disease, he should not be held criminally accountable,[4] the test of criminal responsibility being stated in such cases to be, Was the person capable of knowing at the time of the act that it was a wrongful one, and had he the power or control over his will to prevent him from doing it?[5]

[1] Parsons v. State, 81 Ala. 577, 60 Am. Rep. 193, overruling previous Alabama cases on the subject; Bradley v. State, 31 Ind. 492; Sawyer v. State, 35 Ind. 80; Baldwin v. State, 12 Mo. 223; State v. Hundley, 46 Mo. 414; State v. Kotovsky, 74 Mo. 247; Com. v. Freth ("Defense of Insanity"), 3 Phila. 105; Brown v. Com. 78 Pa. 122; Sayres v. Com. 88 Pa. 291; Davis v. United States, 165 U. S. 373, 41 L. ed. 750. But see later Missouri cases cited in last section.

[2] Bradley v. State, 31 Ind. 492.

[3] Parsons v. State, 81 Ala. 577, 60 Am. Rep. 193; Farrer v. State, 2 Ohio St. 54; Nevling v. Com. 98 Pa. 323.

[4] Stevens v. State, 31 Ind. 485, 99 Am. Dec. 634; Grubb v. State, 117 Ind. 277; Sawyer v. State, 35 Ind. 80; Com. v. Rogers, 7 Met. 500, 41 Am. Dec. 458; State v. Pagels, 92 Mo. 300; State v. Jones, 50 N. H. 369, 9 Am. Rep. 242; State v. Bartlett, 43 N. H. 224, 80 Am. Dec. 154; State v. Pike, 49 N. H. 399, 6 Am. Rep. 533; Com. v. Freeth, 5 Pa. L. J. 445; United States v. Hewson, 7 Law Rep. 361.

[5] Parsons v. State, 81 Ala. 577, 60 Am. Rep. 195; Williams v. State, 50 Ark. 517; State v. Reidell, 9 Houst. 470; State v. Windsor, 5 Harr. (Del.) 515; State v. Brown, 1 Houst. Crim. Cas. 539; State v. West, 1 Houst. Crim. Cas. 371; Hornish v. People, 142 Ill. 620, 18 L. R. A. 237; Blake v. State, 121 Ind. 433, 16 Am. St. Rep. 408; Walker v. State, 102 Ind. 502; Farris v. Com. (Ky.) 1 S. W. 729; Montgomery v. Com. 88 Ky. 509; Shannahan v. Com. 8 Bush, 464, 8 Am. Rep. 465; Kriel v. Com. 5 Bush, 363; Graham v.

An exception to the general rule of criminal responsibility where one has sufficient reason to distinguish between right and wrong as to the particular act to be committed exists where, in consequence of some delusion, the will is overmastered and there is no criminal intent,[1] and a person is criminally irresponsible where, by reason of insanity, he is not capable of knowing that he is doing wrong, or where he has not power to resist temptation to violate the law,[2] and has not knowledge and understanding of the character and consequences of his act.[3] To be criminally responsible a man must have reason enough to be able to judge of the character and consequences of the act committed, and he must not have been overcome by an irresistible impulse arising from disease.[4]

The power to deliberate, premeditate, and design, in the absence of power to determine properly the true nature and character of the act, its effect upon the subject, and the true responsibility for the occasion, and the power to control the impulses of the mind and prevent the execution of the thought that possesses it, is not a true test of criminal responsibility.[5] One is criminally responsible, however, where he had sufficient intelligence to know what he was doing, and will power to do or not to do the criminal act, though he may have been deranged;[6] and

Com. 16 B. Mon. 587; Smith v. Com. 1 Duv. 224; Burgo v. State, 26 Neb. 369; State v. Hansen, 25 Or. 391; Clark v. State, 12 Ohio, 483, 40 Am. Dec. 481; Blackburn v. State, 23 Ohio St. 146; State v. Kalb, 2 Ohio Leg. News, 364; Com. v. Haskell, Phila. Leg. Int. (Dec. 4, 1868); Com. v. Winnemore, 1 Brewst. 356; Hall v. Com. 22 W. N. C. 25; Com. v. Platt, 11 Phila. 421.

[1] Roberts v. State, 3 Ga. 310. But see subsequent Georgia cases cited *supra* in last above section.

[2] People v. Finley, 38 Mich. 482; Parsons v. State, 81 Ala. 577, 60 Am. Rep. 193; Smith v. Com. 1 Duv. 224; State v. Mewherter, 46 Iowa, 88; State v. Felter, 25 Iowa, 67.

[3] State v. Mewherter, 46 Iowa, 88; State v. Felter, 25 Iowa, 67.

[4] State v. Johnson, 40 Conn. 136; State v. West, 1 Houst. Crim. Cas. 371; Conway v. State, 118 Ind. 482.

[5] Bennett v. State, 57 Wis. 69, 46 Am. Rep. 26; Kearney v. People, 11 Colo. 258; Stevens v. State, 31 Ind. 485, 99 Am. Dec. 634.

[6] State v. Windsor, 5 Harr. (Del.) 512; Dunn v. People, 109 Ill. 635; Grubb v. State, 117 Ind. 277; Goodwin v. State, 96 Ind. 550; Fouts v. State, 4 G. Greene, 500; State v. Jones, 50 N. H. 362, 9 Am. Rep. 242;

irresistible impulse caused by anger or resentment, though uncontrollable, will not excuse crime where the person committing it was otherwise sane.[1] Nor will mere moral obliquity of perception protect a person from punishment for a deliberate criminal act,[2] or a mere perversion of the affections.[3]

An uncontrollable propensity which will relieve from criminal responsibility must have its origin solely in a diseased or insane mind.[4] And moral insanity not being of common occurrence, evidence of its existence and operation cannot be tested by the general rule applicable to the common and usual forms of insanity and is to be received and passed upon with caution;[5] and the utmost care should be taken by the court in presenting to the jury the legal principles relating to it.[6] The doctrine which recognizes a mania consisting of an insane influence pressing on the mind and drawing it to consequences which it sees but cannot avoid, is dangerous in its relations, and can be recognized only in the clearest cases, and the disturbance ought to be shown to have been habitual, or at least to have evinced itself in more than a single instance;[7] though an instruction that the jury ought not to acquit upon the ground of moral insanity unless it had manifested itself in former acts of a similar character, is misleading and erroneous.[8] And moral insanity ought never to be admitted as a defense in a prosecution for crime, unless it is

Hall v. Com. 22 W. N. C. 25; Leache v. State, 22 Tex. App. 279, 58 Am. Rep. 638; Com. v. Jones, 1 Leigh, 612; Wilcox v. State, 94 Tenn. 106.

[1] Bolling v. State, 54 Ark. 588; Smith v. State, 55 Ark. 259; Williams v. State, 50 Ark. 517; Blake v. State, 121 Ind. 433, 16 Am. St. Rep. 408; Goodwin v. State, 96 Ind. 550; Sanders v. State, 94 Ind. 147; Guetig v. State, 66 Ind. 94, 32 Am. Rep. 99; State v. Felter, 25 Iowa, 67; State v. Mewherter, 46 Iowa, 88: State v. Stickley, 41 Iowa, 232; Fitzpatrick v. Com. 81 Ky. 357; People v. Durfee, 62 Mich. 487; People v. Finley, 38 Mich. 482; People v. Mortimer, 48 Mich. 37; Com. v. Freeth, 5 Pa. L. J. 445; Brown v. Com. 78 Pa. 122; Sayres v. Com. 88 Pa. 291.

[2] Taylor v. Com. 109 Pa. 262.

[3] Goodwin v. State, 96 Ind. 550.

[4] State v. Mewherter, 46 Iowa, 88; Boswell v. State, 63 Ala. 307, 35 Am. Rep. 20; Leache v. State, 22 Tex. App. 279, 58 Am. Rep. 638.

[5] Com. v. Mosler, 4 Pa. 264.

[6] Scott v. Com. 4 Met. (Ky.) 227, 83 Am. Dec. 461.

[7] Coyle v. Com. 100 Pa. 573, 45 Am. Rep. 397.

[8] Scott v. Com. 4 Met. (Ky.) 227, 83 Am. Dec. 461.

shown that the propensity existed in such violence as to subject the intellect, control the will, and render it impossible for the party to do otherwise than yield,[1] by overriding the reason and judgment and obliterating the sense of right and wrong as to the particular act done, and depriving the party of the power to choose between them.[2]

So, an instruction giving the right and wrong test of criminal responsibility is not erroneous when it does not forbid the jury to consider the question whether the accused was capable of self-control and of choosing the right instead of the wrong.[3] And it is proper to refuse to instruct that if at the time of committing a crime the accused was moved thereto by an insane impulse controlling his will and judgment, which was too powerful for him to resist, not arising from voluntary causes or induced by himself, he cannot be found guilty, as it is a question of fact and not of law,[4] and refusal to instruct as to moral insanity or irresistible impulse, is not error where the tendency of the evidence is to support a wholly different theory, and there is no evidence tending to show incapacity to act upon the knowledge that the deed was wrong;[5] nor should such an instruction be so framed as to create the impression that this form of insanity was the sole object of the inquiry, where the tendency of the evidence is to show latent hereditary insanity developed into active existence by a shock.[6]

[1] Scott v. Com. 4 Met. (Ky.) 227, 83 Am. Dec. 461; Fisher v. People, 23 Ill. 283; State v. Mewherter, 46 Iowa, 88; Wright v. People, 4 Neb. 407; Com. v. Werling, 164 Pa. 559; Taylor v. Com. 109 Pa. 262; Ortwein v. Com. 76 Pa. 414, 18 Am. Rep. 420; Com. v. Mosler, 4 Pa. 264.

[2] Meyer v. People, 156 Ill. 126; Lilly v. People, 148 Ill. 467; Dacey v. People, 116 Ill. 555; Dunn v. People, 109 Ill. 635; Hopps v. People, 31 Ill. 385; Leache v. State, 22 Tex. App. 279, 58 Am. Rep. 638; King v. State, 9 Tex. App. 515.

[3] Farrer v. State, 2 Ohio St. 54.

[4] Grubb v. State, 117 Ind. 277.

[5] United States v. Guiteau, 1 Mackey, 498, 47 Am. Rep. 247. And see Clark v. Trail, 1 Met. (Ky.) 35.

[6] Dejarnette v. Com. 75 Va. 867.

For Dr. Clevenger's discussion on this subject, see *Uncontrollable Propensity, Irresistible Impulse, Obsessions, Will Power, Intent, Perverted Affections, Moral Insanity, Self-Control, Heredity.*

§ 8. *Kleptomania.*

Kleptomania is defined to be a species of mania consisting of an irresistible propensity to steal.[1] When this species of insanity is clearly established it will render its subject irresponsible for theft.[2] And an instruction in a prosecution for larceny in which the defense is kleptomania, on the general subject of insanity, is defective in failing to define its peculiar symptoms as relating to the general subject.[3] But a conviction for larceny will not be set aside as against the weight of evidence where the defense is kleptomania, except in an extreme case,[4] and it makes no difference as to the guilt of the person committing the larceny what sort of an impulse controlled him or how strong it was or what produced it, where it does not appear to be a case of kleptomania.[5]

§ 9. *Erotomania.*

Erotomania is defined to be a morbid sexual propensity. When interposed as a defense in a criminal prosecution it is governed by the rule applicable to general or partial insanity, that it excuses crime only when it deprives the party of reason with regard to the act in question, and evidence in a prosecution for homicide that the accused was afflicted with erotomania is not admissible, as there is no connection between that species of mania and that which leads to homicide.[6]

III. Temporary and recurrent insanity.

Temporary insanity may be defined to consist of occasional fits of madness,[7] and recurrent insanity is insanity returning from

[1] Black's Law Dictionary.

[2] Harris v. State, 18 Tex. App. 287.

[3] Looney v. State, 10 Tex. App. 520, 38 Am. Rep. 646.

[4] Com. v. Fritch, 9 Pa. Co. Ct. 164.

[5] Henslie v. State, 3 Heisk. 202.

For Dr. Clevenger's discussion on this subject, see *Larceny, Kleptomania*, chap. VI.

[6] State v. Simms, 71 Mo. 538.

For Dr. Clevenger's discussion on this subject, see *Erotomania, Satyriasis, Nymphomania, Sexual Offenses*, chap. VI.

[7] See Reg. v. Richards, 1 Fost. & F. 87.

time to time.[1] They are not a defense in a criminal prosecution, where the person committing the crime was not afflicted with the malady at the time.[2] And where the crime was committed during a lucid interval, though he is generally insane, he is responsible therefor if he was capable of distinguishing good from evil.[3] Where partial insanity is interposed as a defense to a criminal act it must be proved that the act was committed during an attack of the disease, to justify an acquittal, and the act itself cannot be taken as evidence of such an attack of the disease;[4] and it is a question for the jury to determine whether or not the criminal act was done during a fit of madness.[5]

IV. Existence of insanity—how determined.

The question as to how much intellect, understanding, judgment, and comprehension one must have to make him amenable to the law with respect to a criminal act is one of law for the court.[6] But the question of the existence of insanity which will excuse crime where the commission of the criminal act is established is one of fact for the jury[7] under proper instructions,[8] to be submitted to and determined by it like any other fact in the case.[9] All symptoms of delusions or mental disease are purely matters of fact for the jury,[10] and the weight and sufficiency of

[1] Smith v. State, 22 Tex. App. 316.

[2] Bellingham's Case, 1 Collinson, Lunacy, 636.

[3] Clark's Case, 1 City Hall Rec. 176.

[4] People v. Pine, 2 Barb. 566.

[5] Reg. v. Richards, 1 Fost. & F. 87.

For Dr. Clevenger's discussion on this subject, see *Temporary Insanity, Emotional Insanity, Transitory Frenzy, Recurrent Insanity, Lucid Interval, Partial Insanity.*

[6] People v. Waltz, 50 How. Pr. 204; People v. Holmes (Mich.) 69 N. W. 501.

[7] Jamison v. People, 145 Ill. 357; Hornish v. People, 142 Ill. 620, 18 L. R. A. 237; Plake v. State, 121 Ind. 433, 16 Am. St. Rep. 408; State v. Klinger, 43 Mo. 127; State v. Holme, 54 Mo. 153; State v. Pike, 49 N. H. 399, 6 Am. Rep. 533; People v. Pine, 2 Barb. 566; State v. Stark, 1 Strobh. L. 479; Clark v. State, 8 Tex. App. 350; Beasley v. State, 50 Ala. 149, 20 Am. Rep. 292; Bowler's Case, 1 Collinson, Lunacy, 673.

[8] People v. Pine, 2 Barb. 566.

[9] State v. Holme, 54 Mo. 153.

[10] State v. Hundley, 46 Mo. 414.

evidence to establish the defense of insanity are questions exclusively for the jury.[1] And where insanity is interposed as a defense in a prosecution for homicide it is always left to the jury to determine whether the mental condition of the accused was such that he was capable of a specific intent to take life.[2] These rules apply to temporary or periodical insanity,[3] and it is a question for the jury whether the accused labored under the influence of a delusion which rendered his mind insensible of the nature of his act,[4] as is also the question of the existence and the effect on the mind of insanity which subverts the freedom of the will and destroys the power of the victim to choose between right and wrong, though he may be able to perceive the difference between them.[5] And where insanity is alleged as a defense in a prosecution for homicide, the question as to whether the accused was guilty of murder in the first or second degree should be submitted to the jury, as well as the question whether or not he was insane.[6] But an instruction that if the accused was insane the verdict should be "not guilty," but if sane he is guilty of a criminal homicide, and that it is for the jury to determine the degree of guilt, is erroneous as a usurpation of the province of the jury, which is to decide whether the act was criminal, even though he were not insane at the time.[7] So, the submission of the issue of sanity or insanity to the jury is not error where there is evidence on that question,[8] and it is to be passed upon by the jury whether the accused has introduced evidence upon the subject or not, and they must consider, not only the evidence directed specifically to that question, but also all circumstances developed by the evidence bearing upon it.[9] And a verdict or finding will not be set

[1] Brown v. Com. 14 Bush, 398.

[2] United States v. King, 34 Fed. Rep. 302; Dejarnette v. Com. 75 Va. 867.

[3] Cunningham v. State, 56 Miss. 269, 21 Am. Rep. 360; Reg. v. Richards, 1 Fost. & F. 87.

[4] Bowler's Case, 1 Collinson, Lunacy, 673; Grubb v. State, 117 Ind. 277.

[5] Parsons v. State, 81 Ala. 577, 60 Am. Rep. 193; State v. Jones, 50 N. H. 369, 9 Am. Rep. 242.

[6] People v. Walter, 1 Idaho, 386. And see People v. Webster, 59 Hun, 389.

[7] People v. Webster, 59 Hun, 398.

[8] Crews v. State, 34 Tex. Crim. Rep. 533.

[9] McDougal v. State, 88 Ind. 24.

aside or disturbed where the evidence as to insanity is conflicting,[1] or where there is room for a difference of opinion as to the sanity of the accused under the evidence and instructions,[2] or unless the court is clearly satisfied that it was erroneous and unjust.[3] The insanity of a person accused of crime who pleads guilty, however, is an issue for the court, and is required to be shown before his conviction can be had, and evidence as to his insanity should be introduced at the time of making the plea.[4] It is the duty of the jurors to carefully consider and weigh the evidence upon the subject of insanity and give it the weight and credit which their judgment and conscience deem it entitled to receive.[5] And it is not improper for the court to tell the jury that the defense of insanity should be examined with caution.[6] But the instruction as to what constitutes insanity should not be argumentative or such as to lead the jury to believe that the defense of insanity was not worthy of consideration.[7]

V. Proof necessary to establish insanity.

§ 1. *Generally.*

To convict in a criminal prosecution the evidence must show that the accused at the time of the commission of the crime possessed that self-determining power which in a sane mind renders it conscious of the nature of its own purpose and capable of resisting wrong desires.[8] But positive and direct testimony is not required to establish insanity as a defense,[9] nor is proof of specific

[1] Jamison v. People, 145 Ill. 357; Boren v. State, 32 Tex. Crim. Rep. 637; People, Clough, v. Levy, 71 Cal. 618; Elder v. State (Ga.) 26 S. E. 80; State v. Dreher (Mo.) 38 S. W. 567.

[2] Williams v. State, 50 Ark. 511.

[3] Hornish v. People, 142 Ill. 620, 18 L. R. A. 237.

[4] Burton v. State, 33 Tex. Crim. Rep. 138.

[5] Goodwin v. State, 96 Ind. 550; State v. Scott, 49 La. Ann. 253

[6] People v. Kloss (Cal.) 47 Pac. 459; People v. McCarthy (Ca.) 46 Pac. 1073; People v. Bumberger, 45 Cal. 650; People v. Pico, 62 Cal. 50; Sanders v. State, 94 Ind. 147; People v. Degraff, 1 Wheeler, Crim. Cas. 203.

[7] People v. Holmes (Mich.) 69 N. W. 501; Aszman v. State, 123 Ind. 347, 8 L. R. A. 33.

[8] Nevling v. Com. 98 Pa. 326; Hall v. Com. 22 W. N. C. 25.

[9] State v. Wright (Mo.) 35 S. W. 1145; State v. Simms, 68 Mo. 305.

acts of derangement where the jury finds from all the evidence of the case that the party is insane;[1] and a person accused of crime may be acquitted on the ground of insanity though he objected to that defense and asserted that he was not insane and called witnesses to prove his sanity, where the whole evidence justifies such an acquittal.[2] The testimony of the accused himself, however, that he did not know that the act was wrong and criminal does not tend to prove idiocy or lunacy, or that he was laboring under such a defect of reason as not to know the nature and quality of the act;[3] and refusal to instruct with reference to insanity is justifiable where the only testimony bearing upon the question is that of the defendant herself, and she testifies to a state of facts inconsistent with such a conclusion.[4]

§ 2. *Previous and subsequent insanity.*

As a general rule insanity at the very instant of the commission of a crime can only be established by evidence tending to prove that the party was insane at some period either before or afterwards,[5] and such evidence is to be considered and weighed in connection with acts of the party tending to establish the fact.[6] Thus, a conviction should be reversed where there is a mass of credible testimony showing the insanity of the accused at the time of and preceding the offense, where the state offered no evidence whatever relating to his condition during that time.[7] And a minute recollection on the part of the accused of the circumstances and details of the crime a long time afterwards is strong evidence of his sanity at the time.[8] So, reference in an instruction to the mental condition of the defendant at the date named

[1] People v. Tripler, 1 Wheeler, Crim. Cas. 48.

[2] Reg. v. Pearce, 9 Car. & P. 667; State v. Reidell, 9 Houst. 470.

[3] State v. Kluseman, 53 Minn. 541.

[4] Perry v. State, 87 Ala. 30; Knight v. Young, 2 Ves. & B. 184.

For Dr. Clevenger's discussion on this subject, see *Evidence, Testimony, Knowledge of Nature of Act*, chap. VI.

[5] People v. March, 6 Cal. 543.

[6] Murphy v. Com. 92 Ky. 485; Montgomery v. Com. 88 Ky. 509; People v. Clendennin, 91 Cal. 35.

[7] Armstrong v. State, 30 Fla. 170, 17 L. R. A. 484.

[8] Pinoevi's Case, 5 City Hall Rec. 123; Trial of Ferrers, 19 How. St. Tr. 947.

in the indictment, where all the evidence is directed to another and later date, is not reversible error as tending to mislead the jury.[1] And an affidavit for continuance on the ground of absent witnesses to prove the insanity of the accused should be clear as to his conduct for a considerable time before the crime up to a recent period, so as to negative the idea that he was of sound mind at that time.[2]

But proof of independent acts or circumstances subsequent to the commission of the crime does not establish insanity at the time of its commission.[3] And the insanity of the accused cannot be proved by subsequent conversations with him, and evidence of the test applied during the interval to test his sanity cannot be given.[4] And to justify a reversal on the ground of the exclusion of evidence of subsequent acts it must appear that they had some special significance indicating mental disease.[5] Nor will a new trial be ordered on the ground that the verdict was against evidence, where there was scarcely a shadow of testimony tending to show insanity up to the time of the offense, upon evidence as to the conduct of the accused after confinement, where it appeared by the testimony of intimate acquaintances that he was a man of ordinary intelligence.[6] But the opinions of medical men who had seen the accused subsequent to the commission of the act, that his insanity was chronic, and therefore that he was insane at the time of the act, justifies the submission of the case to the jury, though all the circumstances showed premeditation, preparation, and design, and consciousness that he had violated the law.[7] On appeal from a judgment of conviction, however, the court cannot act upon evidence furnished by the present condition of the defendant, whose insanity had increased and developed since the trial, and upon that ground reverse a judgment otherwise legal.[8]

[1] Colee v. State, 75 Ind. 513.
[2] Bellingham's Case, 1 Collinson, Lunacy, 636.
[3] Murphy v. Com. 92 Ky. 485.
[4] Choice v. State, 31 Ga. 424.
[5] State v. Lewis, 20 Nev. 333.
[6] Phelps v. Com. 17 Ky. L. Rep. 706.
[7] Reg. v. Southey, 4 Fost. & F. 864.
[8] People v. Schmitt, 106 Cal. 48.

For comments on this subject by Dr. Clevenger, see *Remissions, Recurrent Insanity, Lucid Interval, Premeditation, Design, Planning.*

§ 3. *Nature of the crime.*

The atrocity or terrible nature of the criminal act is not evidence of the insanity of the perpetrator.[1] Nor is the barbarity with which the act is committed,[2] nor the fact that it was of an unnatural character,[3] nor is the enormity of the crime;[4] and refusal to instruct as to insanity is not error where there is nothing to suggest doubt as to sanity except the enormity of the crime.[5] Nor can insanity be inferred merely from the oddness of the deed or the daring manner in which it was committed,[6] though the enormity of the crime may be considered with other evidence in determining whether or not the accused was sane.[7] So, an act of homicide cannot be regarded as proof in itself of insanity, but it is proper to examine the act with all its attending circumstances, to determine whether it is most consistent with real or feigned insanity.[8]

§ 4. *Motive.*

Mere want of motive in the commission of a crime is not of itself sufficient to establish insanity,[9] and a verdict of guilty will not be disturbed on appeal where the mind of the accused was not so diseased that he did not know right from wrong and the consequences of his own act, though there was little or no provocation.[10] But the presence or absence of a motive may be considered with other evidence in determining whether or not the

[1] Laros v. Com. 84 Pa. 200; State v. Coleman, 20 S. C. 441.

[2] State v. Stark, 1 Strobh. L. 479; United States v. Lee, 4 Mackey, 489, 54 Am. Rep. 293.

[3] Hall's Case, 2 City Hall Rec. 85; Laros v. Com. 84 Pa. 200.

[4] Com. v. Buccieri, 153 Pa. 535; Com. v. Mosler, 4 Pa. 264.

[5] Singleton v. State, 71 Miss. 782.

[6] Com. v. Farkin, 2 Pa. L. J. 475.

[7] Com. v. Buccieri, 153 Pa. 535.

[8] People v. Lake, 2 Park. Crim. Rep. 215; Beasley v. State, 50 Ala. 149, 20 Am. Rep. 292.

See *Testamentary Capacity or Insanity Inferred from Nature of a Will.* The application might sometimes be made to nature of acts in criminal cases. Also *Nature of Act.* S. V. C.

[9] Com. v. Mosler, 4 Pa. 264; Carter v. State, 12 Tex. 500, 62 Am. Dec. 539; Reg. v. Dixon, 11 Cox, C. C. 341.

[10] State v. Schaefer, 116 Mo. 96.

accused was sane,[1] and where no motive for the crime is established it is an important consideration upon the issue of insanity,[2] and the commission of a homicide without motive, which is unnatural and extraordinary, is of itself sufficient evidence of insanity to authorize the admission of testimony to show the insanity of the parents of the accused.[3] Nor will a conviction be set aside on the ground of insanity of the accused where the question of insanity was fully submitted and motives for the deed were clearly shown.[4] It is the duty of the jury to determine from the evidence, where insanity is relied upon, whether the accused committed the act under or in the absence of such motives as would naturally influence the mind of a depraved man to acts of violence, and if he committed the act under the influence of anger, jealousy, or hate, that circumstance would add great strength to the proof of his sanity; and if actual insanity is not made out the jury may infer revenge or passion, and not insanity.[5] But an instruction that the jury is not warranted in inferring insanity from the mere fact of the commission of the crime, or from its enormity, or from an apparent absence of adequate motive, as the law presumes that it was prompted by malice, is erroneous as an instruction upon the weight of evidence, under a statute prohibiting such instruction.[6]

§ 5. *Acts and conduct.*

Insanity may be proved by showing acts, declarations, and conduct evidencing an aberration of the mind;[7] and the conduct, declarations, and acts of the accused, and any change therein, and its extent and cause, and all other such circumstances exhibited at or about the date of the crime and previous thereto, are to be considered, and are entitled to more or less weight according to

[1] Com. v. Buccieri, 153 Pa. 535.
[2] People v. Barber, 115 N. Y. 475.
[3] Murphy v. Com. 92 Ky. 485.
[4] Shaw v. State, 32 Tex. Crim. Rep. 155.
People v. Messersmith, 61 Cal. 246.
[5] Kearney v. State, 68 Miss. 233.
For Dr. Clevenger's discussion on this subject, see *Motive, Anger, Hatred, Revenge, Jealously, Malice.*
[7] State v. Brinyea, 5 Ala. 241.

their nature and their nearness to the act in question.[1] The fact that a person is unable to discriminate between right and wrong is best ascertained, not by any medical theory, but by such acts and conduct of the individual himself,[2] and is of more value than the opinions of witnesses, however learned or experienced they may be.[3] And a man's general habits constitute better evidence than his particular acts.[4] Thus, evidence that the mind of the accused had undergone a marked change, that he had become taciturn, irritable, and unsocial, absent-minded, restless, forgetful, and partially absorbed in thought, avoiding company and believing himself crazy, and that he killed his friend and employer without apparent reason, and made no effort to escape, is sufficient to establish his insanity.[5] And insanity is established by proof of the killing by a nurse girl of her employer's children, of whom she was very fond, and that she was weakminded and imbecile, and showed no fear, anger, shame, grief, or hardihood or consciousness that she had taken human life, but seemed to be studying about something.[6] So, the fact that the accused, prior to the commission of the act, could not sleep nights, and went instinctively where he could lean against a bag of oats, instead of lying down to sleep, is strong evidence of insanity where he probably did not know that this was a symptom, and was not feigning insanity.[7] And evidence of a mania for stealing ladies' shoes without any apparent object, and that the insanity was hereditary, and that the accused had received an injury to his head, is sufficient to justify an acquittal on a prosecution for robbing a lady of her shoe.[8] The concealment of a theft, however, and an endeavor to escape, and a judicious use of the property stolen, all tend to show a knowledge of the nature of the offense and an

[1] Cole's Trial, 7 Abb. Pr. N. S. 321.

[2] United States v. Shults, 6 McLean, 121.

[3] Smith v. Thomas, 1 Houst. Crim. Cas. 511.

[4] Snook v. Watts, 11 Beav. 105. And see State v. Dreher (Mo.) 38 S. W. 567.

[5] Massengale v. State, 24 Tex. App. 181.

[6] Farrer v. State, 2 Ohio St. 54.

[7] People v. Lake, 2 Park. Crim. Rep. 215.

[8] People v. Sprague, 2 Park. Crim. Rep. 49.

Krafft-Ebing describes shoe-stealing mania as a form of sexual perversion. S. V. C.

ability to discriminate between right and wrong.[1] And evidence of repeated efforts to procure a pistol, and searching for the victim and shooting him, shows criminal responsibility.[2] So, that the accused became restless upon learning of a provocation and moved about uneasily, and behaved in an unusual manner and ate little at dinner, and sat in ambush to shoot and kill the offender, do not furnish the slightest proof of insanity.[3] And evidence that the accused previous to the commission of the crime, while sitting alone sharpening a knife on a stone, rolled his eyes as if he were having some words with somebody, is not sufficient to sustain the defense of insanity.[4] Nor will an attempt to commit suicide, though it may be considered with the other facts and circumstances as bearing upon the question.[5] Nor is evidence that the accused had written a letter in blood, and had strange religious notions, and had a wheel studded with nails upon which he prayed, and believed that he had discovered perpetual motion, and behaved in an eccentric manner and caused a commotion in church, and was jealous of his wife and believed that his life was threatened by her, sufficient to show insanity as a defense to a criminal charge.[6] Nor is an insane delusion that persons about the accused were seeking to injure him, shown by evidence that after the killing he warned people not to come near him and said he had to defend himself, and that upon being arrested he put his hand to his hip and said something about his revolver and wanted to get a butcher knife to defend himself with, and said that he was afraid of being mobbed.[7] So the previous conduct of the family of the person committing a homicide is to be considered on the question of his sanity, and evidence that he had been previously totally deranged, and that a

[1] United States v. Shults, 6 McLean, 121.

But such matters are consistent with insanity, also. S. V. C.

[2] State v. O'Neil, 51 Kan. 651, 24 L. R. A. 555.

Insanity is consistent with designed acts. S. V. C. See *Epilepsy, Traumatic Insanity.*

[3] Lacy v. State, 30 Tex. App. 119.

[4] Ferris v. People, 35 N. Y. 125.

[5] Coyle v. Com. 100 Pa. 573, 45 Am. Rep. 397.

[6] Reg. v. McLeod, 2 Swin. (Sc.) 88.

[7] People v. Slack, 90 Mich. 448.

Delusions of persecution, however, are common in insanity. S. V. C.

nurse had been provided to take care of him, and a straight waist-coat prepared to put on him, would be of considerable weight to establish insanity.[1]

§ 6. *Personal characteristics.*

The temperament and disposition of a person accused of crime, and any change therein, and the extent and cause of such change, are entitled to consideration on the question of his sanity, and to more or less weight according to their nature.[2] Thus, evidence that a party was very weak-minded and particularly deficient in memory and reason, and could not learn anything, and had always been regarded as a fool, together with the opinion of witnesses who knew him that he did not know right from wrong, is sufficient to establish criminal irresponsibility.[3] And spasmodic possession of abnormal muscular strength or unnatural physical power, and the characteristic of great wakefulness and a deranged system and great restlessness, and an abnormal bulging about the eye with a dryness about it and a peculiar vacuous expression, are all evidence of insanity.[4] But mere eccentricity does not show insanity which will operate as an excuse for crime,[5] though it has some bearing on the question.[6] And evidence of a great amount of senseless extravagance and absurd eccentricity of conduct, coupled with habits of excessive intemperance causing fits and delirium tremens, will not support a defense of insanity where the accused was not laboring under the effects of such a fit at the time of the act and there were circumstances showing sense and deliberation and a perfect understanding of the nature of the act.[7] Nor will isolated instances scattered through several years, tending to show insanity, which might be attributed to the excessive use of liquor, and acts which are not necessarily signs of insanity, be sufficient to establish it as against

[1] Trial of Kinloch, 25 How. St. Tr. 891, 997.
[2] Cole's Trial, 7 Abb. Pr. N. S. 321.
[3] Pettigrew v. State, 12 Tex. App. 225.
[4] United States v. Ridgeway, 31 Fed. Rep. 144.
[5] United States v. Young, 25 Fed. Rep. 710; Com. v. Meredith, 17 Phila. 90; Com. v. Cleary, 148 Pa. 26.
[6] Boughton v. Knight, L. R. 3 Prob. & Div. 84.
[7] Reg. v. Leigh, 4 Fost. & F. 915.

evidence of competency to transact business and that the person was treated by his friends and associates as a sane man.[1] Nor do an irritable temper and excitable disposition show insanity.[2] Nor do suspicion of strangers, apparent melancholy, and peculiar deportment generally.[3] And a mere hallucination is not of itself evidence of insanity though the inability to correct it may be.[4] And that the accused was a victim of inordinate passion does not tend to establish his insanity where from his conduct it appears that he had formed a deliberate plan to commit the act and nothing occurred to arouse sudden passion.[5] Nor will proof that the accused was illiterate, ignorant, and passionate justify an instruction as to insanity and the admission of evidence of weak-mindedness.[6] So, evidence that the person on trial for homicide was subject to a peculiar mental infirmity whereby, if unexpectedly touched from behind or in case of a sudden cluck or whistle from behind he would become suddenly excited, lose all reason and self-control, and leap forward and strike the person nearest him, furnishes no defense where at the time of the killing he had not been thus excited.[7]

§ 7. *Exciting causes of insanity.*

A person accused of crime cannot be found to be insane without proof upon the subject other than the fact that a cause existed which might tend to produce insanity.[8] And proof of an exciting cause of an insane paroxysm should not be considered unless the jury finds that there was a latent insanity or a latent tendency to insane paroxysms which could be converted into actuality by the supposed cause.[9] Thus an injury to the head or other part of the person, which might have led to insanity, is not

[1] Hoard v. State, 15 Lea, 318.

[2] Willis v. People, 32 N. Y. 715; Com. v. Cleary, 148 Pa. 26.

[3] State v. Shippey, 10 Minn. 223, 88 Am. Dec. 70.

[4] Com. v. Meredith, 17 Phila. 90.

[5] Sindram v. People, 1 N. Y. Crim. Rep. 448.

[6] Fitzpatrick v. Com. 81 Ky. 357.

[7] Thomas v. State, 71 Miss. 345.

A mental infirmity may readily assume a new direction, and the killing may have been due to insanity. S. V. C.

[8] Sawyer v. State, 35 Ind. 70.

[9] Taylor v. United States, 23 Wash. L. Rep. 433.

evidence from which insanity may be inferred, where there is nothing to show its severity or physical consequences,[1] though it is sufficient to go to the jury with a definition of insanity in its legal sense.[2] So, evidence of mental excitement on the part of the accused arising from misconduct upon the part of his wife, which might become a predisposing cause of insanity, does not establish its existence.[3] And the testimony of a person accused of killing his wife and her paramour that just prior to the killing his mind suddenly left him and became a blank is not sufficient to show that he was incapable of forming an intent to murder, where he remembers all that took place at the interview in which the killing occurred, and had known about their relations for some time.[4] Nor will proof of great excitement and enfeeblement of the mind of a husband who killed his wife, caused by her association with people of bad character, warrant his acquittal where he was capable of transacting business and conversing rationally and characterizing her conduct, and appreciating the danger to which his child would be exposed if brought up among her associates.[5] So, evidence of habitual drunkenness contracted years before, and that the accused had delirium tremens a number of times and was dull and nervous and did not seem to be himself, is not sufficient to show insanity or permanent mental disease.[6] And evidence that the accused was an epileptic, and that the tendency of that disease is to weaken the intellect and sometimes produce total insanity, which fails to show that it had impaired his intellect to any serious extent, is not sufficient to show insanity,[7] and will not justify an instruction that if his faculties were so impaired that he could not recognize the person killed he should be acquitted.[8] The court will not assume as a fact that those afflicted with epilepsy are easily excited to passion and revenge accompanied with a morbid irritability which must

[1] McAllister v. Territory, 1 Wash. Terr. 360.
[2] Reg. v. Law, 2 Fost. & F. 838.
[3] State v. Graviotte, 22 La. Ann. 587; Sawyer v. State, 35 Ind. 80.
[4] People v. Osmond, 138 N. Y. 80.
[5] People v. Montgomery, 13 Abb. Pr. N. S. 207.
[6] State v. Riley, 100 Mo. 493.
[7] Com. v. Buccieri, 153 Pa. 535.
[8] State v. Hayes, 16 Mo. App. 560.

impair moral responsibility and which is of itself sufficient to negative deliberation and premeditation, or that the testimony showing epilepsy is not contradicted, and instruct that this of itself should be sufficient to raise a doubt as to criminal responsibility, where it is contended that the accused had not had attacks for a long time, and that from their light character they had little if any effect on his mental condition.[1] And evidence of epileptic attacks supposed to have been occasioned by a blow on the head in early life, and that the mother of the accused was deranged at some period of her life but had since recovered, does not establish insanity where it appears that he knew what he was doing and appreciated the consequences of his acts,[2] and evidence of the occurrence of an epileptic fit after the trial, in which there was testimony that the accused had fits in his infancy and a few later in life and one a week previous to the criminal act, is merely cumulative and not a ground for a new trial.[3] But an instruction that if the accused had been subject to epilepsy, and epilepsy is a disease which tends to produce insanity, these facts are not sufficient to raise a reasonable doubt of his sanity, is erroneous as tending to mislead and interfere with the province of the jury to weigh the evidence.[4] And the fact that a woman who killed her husband had just recovered from a disease which exhausted the vessels of the brain and weakened its power and tended to produce insane delusions of the senses is evidence from which the jury might find that she was not accountable for the act, though the delusions were not such as to lead to it.[5]

§ 8. *Hereditary Insanity.*

Evidence of hereditary insanity or of a taint of insanity in the ancestors or family of a man is not sufficient to relieve from criminal responsibility in the absence of evidence of actual insanity in

[1] Com. v. Buccieri, 153 Pa. 535.
[2] Lovegrove v. State, 31 Tex. Crim. Rep. 491.
[3] People v. Montgomery, 13 Abb. Pr. N. S. 207.
[4] Guetig v. State, 63 Ind. 278.
[5] Reg. v. Law, 2 Fost. & F. 836.
For Dr. Clevenger's discussion on this subject, see *Epilepsy*, chap. XXIV.

himself.[1] But where testimony is given directly tending to prove insane conduct on the part of the accused, proof of hereditary insanity is admissible in corroboration thereof,[2] and as an additional link in the chain of circumstances.[3] But it is a mere circumstance, and before an inference can be drawn from it the fact of the insanity of the ancestors must be clearly established.[4] And evidence of the temporary insanity of the grandmother of the accused, and of his having fits while teething, is too remote and unreliable to show insanity on his part which will relieve from criminal responsibility.[5] But an instruction that the fact that some or all of one's ancestors had been insane does not of itself prove him insane, that he cannot be excused in the absence of direct and preponderating evidence of insanity, is objectionable as requiring direct proof;[6] and so is one that evidence of insanity of the father and aunt of the accused cannot be considered unless the jury entertains a reasonable doubt of his own sanity, as such a doubt would entitle him to an acquittal without such evidence.[7] Evidence of insanity in the family of the accused, and testimony of his family physician and persons who had long known him tending to show insanity, preponderates over opinions of persons not sufficiently qualified and not substantiated by reasons, that he was sane.[8]

§ 9. *Judicial determinations of insanity.*

As a general rule a judicial determination that a person is sane or insane is prima facie evidence of such fact.[9] But a finding of

[1] Cole's Trial, 7 Abb. Pr. N. S. 321; People v. Pine, 2 Barb. 566; Bradley v. State, 31 Ind. 492; State v. Cunningham, 72 N. C. 469; State v. Kalb, 2 Ohio Legal News, 364; Guiteau's Case, 10 Fed. Rep. 161.

[2] State v. Cunningham, 72 N. C. 469; Guiteau's Case, 10 Fed. Rep. 161; Reg. v. Vyse, 3 Fost. & F. 247.

[3] State v. Cunningham, 72 N. C. 469.

[4] People v. Pine, 2 Barb. 566.

[5] State v. Hockett, 70 Iowa, 442.

[6] State v. Simms, 68 Mo. 305.

[7] Jones v. People (Colo.) 47 Pac. 275.

[8] McLeod v. State, 31 Tex. Crim. Rep. 331.

For Dr. Clevenger's discussion on this subject, see *Heredity*, chap. XXIX.

[9] See chaps. IX., XVII., §§ 7-9.

lunacy in another state is of no effect where it appears that notice of the proceedings was not given,[1] and evidence that the accused had been confined in an insane hospital as an insane man, and the opinion of witnesses that he is still insane, do not establish insanity which will deprive him of capacity to distinguish between right and wrong.[2] So, an order made by the proper board or officer finding a person accused of crime to be a fit subject for treatment in a hospital for the insane is not conclusive of insanity which will render him unaccountable for his criminal acts,[3] though it may be evidence of insanity.[4] And evidence may be introduced to show his mental condition before and after the proceeding before such board or officer.[5] And insanity which authorizes the removal of a convict from a penitentiary to the asylum is not necessarily permanent, and will raise no presumption as to its continuance ten years afterwards, though the fact of such transfer may be a circumstance to be considered on the question of subsequent insanity in connection with other evidence.[6] So, statements, declarations, or admissions of the accused, made while an inmate of an insane hospital, are not to be deemed those of a person of unsound mind, and allowed no weight unless he is proved to have been of unsound mind when he made them, as to so regard them would be to assume that the fact that he was confined in a hospital is prima facie evidence of insanity.[7]

VI. Insanity at and after trial.

§ 1. *Effect.*

The inquiry into the guilt of a person accused of crime must be postponed where he is insane until such time as he shall be able to properly model his defense.[8] The trial and sentence or punishment of an insane person for a criminal act is invalid.[9]

[1] Com., Stewart, v. Kirkbride, 2 Brewst. 419.
[2] Meyer v. People, 156 Ill. 126.
[3] Pflueger v. State, 46 Neb. 493; Goodwin v. State, 96 Ind. 550.
[4] Pflueger v. State, 46 Neb. 493.
[5] Goodwin v. State, 96 Ind. 550.
[6] Langdon v. People, 133 Ill. 382.
[7] Goodwin v. State, 96 Ind. 550.
[8] Frith's Case, 22 How. St. Tr. 307. And see Com. v. Braley, 1 Mass. 103.
[9] Freeman v. People, 4 Denio, 9, 47 Am. Dec. 216.

And where there is doubt as to the sanity of the accused he is not to be put upon trial, but a preliminary proceeding should be instituted to ascertain whether he is sane or insane.[1] And where a person once found insane at the time of his proposed trial is called for trial a second time, if there is then doubt as to his sanity the court must proceed as before and try the question of sanity anew, and so on as often as the occasion may require.[2] This is a common-law right,[3] but it is frequently provided for by statute, and such statutory provisions are in aid of, and substantially in affirmance of, the common-law right, and not in derogation of constitutional provisions securing to the accused a fair and impartial trial.[4] The fact that the defendant in a criminal prosecution was insane, however, when required by the conditions of his bail bond to plead to an indictment, and that he had been taken out of the state and confined in an insane asylum to be treated for his insanity, is no defense to his sureties in an action on the bond.[5]

§ 2. *Question when and how raised.*

The question, though usually raised when the accused is brought up to plead,[6] may be raised at any time during the course of the proceeding, and if at any time a doubt arises as to his sanity it is the duty of the court to suspend further proceedings at whatever stage the doubt arises.[7] And it may be raised by counsel[8] or by suggestion from anyone,[9] or the court may suspend proceedings when a doubt arises of its own motion, and the counsel for the accused cannot waive an inquiry as to his client's sanity where a

[1] Jones v. State, 13 Ala. 153; People v. Ah Ying, 42 Cal. 18; People v. Farrell, 31 Cal. 576; State v. Harris, 8 Jones, L. 136; Reg. v. Berry, 34 L. T. N. S. 590; Ley's Case, 1 Lewin, C. C. 144.

[2] People v. Farrell, 31 Cal. 576.

[3] Freeman v. People, 4 Denio, 9, 47 Am. Dec. 216; French v. State, 93 Wis. 325.

[4] French v. State, 93 Wis. 325.

[5] Adler v. State, 35 Ark. 517, 37 Am. Rep. 48.

[6] Jones v. State, 13 Ala. 153; State v. Harris, 8 Jones, L. 136.

[7] People v. Ah Ying, 42 Cal. 18; People v. Farrell, 31 Cal. 576; Reg. v. Berry, 34 L. T. N. S. 598.

[8] Reg. v. Southey, 4 Fost. & F. 864; Reg. v. Turton, 6 Cox, C. C. 385.

[9] State v. Harris, 8 Jones, L. 136; Guagando v. State, 41 Tex. 626.

doubt exists.[1] Present insanity at the time of the trial, however, must be specially pleaded, and cannot be established, like insanity, at the time of the commission of the act, under a plea of not guilty.[2] And a person charged with felony, who is at liberty on bail to answer, is not in confinement within the meaning of Ala. Rev. Code, § 1060, authorizing an inquiry as to the sanity of persons in confinement under indictment with a view to their removal to the insane asylum.[3]

§ 3. *Determination as to submission of issue.*

Whether a preliminary proceeding shall be instituted to ascertain as to the sanity of the person accused of crime rests in the sound discretion of the court.[4] The court will not impanel a jury to inquire as to such sanity unless it can see reasonable grounds to doubt his sanity, and it may inspect and examine him and consider his actions and demeanor and read affidavits and inquire of physicians and others touching his then mental condition for the purpose of determining what action to take.[5] And the decision of the court will not be reversed on appeal, unless it manifestly appears that it was wrong, or that the discretion of the court was abused.[6] And where the prisoner pleads to the indictment, the omission to institute such an inquiry cannot be assigned as error, though there was ground for belief that he was insane.[7] So, the admission of evidence as to the defendant's insanity at the time of the trial does not indicate a doubt as to his sanity which would require the submission of the question to a jury,[8] and a refusal of the court to instruct that he must be acquitted if then insane indicates that the court had no doubt of his sanity.[9] And where the court has no doubt of sanity, and no request is made to have

[1] People v. Ah Ying, 42 Cal. 18.

[2] Danforth v. State, 75 Ga. 614, 58 Am. Rep. 480; Long v. State, 38 Ga. 491; Green v. State, 88 Tenn. 614.

[3] *Ex parte* Trice, 53 Ala. 546.

[4] Jones v. State, 13 Ala. 153.

[5] State v. Harrison, 36 W. Va. 729, 18 L. R. A. 224. And see State v. Arnold, 12 Iowa, 479.

[6] State v. Harrison, 36 W. Va. 729, 18 L. R. A. 224.

[7] Jones v. State, 13 Ala. 153.

[8] People v. Lee Fook, 85 Cal. 300.

[9] People v. Lee Fook, 85 Cal. 300.

that issue submitted, it does its whole duty by admitting evidence of insanity before and after the commission of the offense, and bearing upon the question of sanity at that time, though there was evidence of insanity at the time of the trial.[1] Nor is it proper to instruct the jury to acquit if the accused is insane at the time of the trial, where no issue as to present insanity is submitted to them.[2] It is the duty of the court, however, to suspend the trial and impanel another jury, and inquire into the question, where there is reasonable ground for doubt of the sanity of the accused at the time of the trial;[3] and refusal to submit the question on the plea submitted by affidavits filed before the trial is not cured by trying the issue after trial and conviction.[4] And one who has been removed to a lunatic asylum will nevertheless be brought up for inquiry into his sanity unless it would be dangerous to bring him into court, though the governor of the asylum makes affidavit that he is in a helpless state of insanity.[5] Jurisdiction given by Ala. Rev. Code, § 1060, to circuit judges in certain cases to order an inquiry as to the sanity of persons confined under indictment, vests in the judge, and not in the court.[6]

§ 4. *Questions for determination.*

The question on a trial had upon a suggestion that the defendant is insane is as to his present insanity.[7] The jury has nothing to do with his condition at the time he is alleged to have committed the act except so far as that condition may aid in determining his present condition.[8] And the accused cannot be kept in an asylum until his recovery, and then be again tried, where the evidence as to his insanity related to the time of the criminal act charged, and not to the time of the trial.[9]

[1] People v. Lee Fook, 85 Cal. 300.
[2] People v. Lee Fook, 85 Cal. 300, 301.
[3] Gruber v. State, 3 W. Va. 699.
[4] Guagando v. State, 41 Tex. 626.
[5] Reg. v. Dwerryhouse, 2 Cox, C. C. 446.
[6] *Ex parte* Trice, 53 Ala. 546.
[7] People v. Farrell, 31 Cal. 576; State v. O'Grady, 3 Ohio Legal News, 137; State v. Arnold, 12 Iowa, 479.
[8] State v. O'Grady, 3 Ohio Legal News, 137; State v. Arnold, 12 Iowa, 479; Walker v. State, 46 Neb. 25.
[9] Firby v. State, 3 Baxt. 358.

So, knowledge of right and wrong as a test of insanity does not apply to a collateral proceeding to ascertain the mental capacity of the person about to be put on trial for a criminal act.[1] The question upon such inquiry is whether the accused is sane enough to make a rational defense and to present to counsel the facts which ought to be stated and presented to the jury upon his trial.[2] And no person should be tried when he has not reason to appreciate his peril or to act advisedly in suggesting to his counsel such facts as would break the force of the prosecuting evidence and introduce such exculpatory proof as his case would warrant.[3] But one who is capable of rationally comprehending his own condition with reference to the proceeding, and of conducting his defense in a rational manner, is not insane within a prohibition against the trial of insane persons.[4]

It is not necessary that he should have capacity to understand and comprehend all his legal rights, and to make known in the most distinct and intelligent manner to his counsel all the facts material to his defense. It is sufficient if his intelligence is such as to secure him a fair and impartial trial.[5] And a new trial will not be granted on the ground of insanity during the progress of the trial in the absence of evidence of such insanity, where proper consultation with counsel was had.[6] A person deaf and dumb from nativity may be arraigned for trial if intelligence can be conveyed to him by signs and symbols.[7] And evidence that a person accused of crime had been confined in a lunatic asylum, at which time he was in a state of maniacal irascibility, and that he was addicted to theft, and that he denied being insane, and that his conduct while in jail was different from that of

[1] Freeman v. People, 4 Denio, 9, 47 Am. Dec. 216.

[2] Freeman v. People, 4 Denio, 9, 47 Am. Dec. 216; State v. O'Grady, 3 Ohio Legal News, 137; Guagando v. State, 41 Tex. 626; Rex v. Pritchard, 7 Car. & P. 303; Rex v. Dicen, 7 Car. & P. 307; Frith's Case, 22 How. St. Tr. 307.

[3] Taffe v. State, 23 Ark. 34; State v. Peacock, 50 N. J. L. 34; Reg. v. Berry, 34 L. T. N. S. 590.

[4] Freeman v. People, 4 Denio, 9, 47 Am. Dec. 216; People v. Rhinelander, 2 N. Y. Crim. Rep. 335.

[5] State v. Arnold, 12 Iowa, 479.

[6] Com. v. Winnemore, 1 Brewst. 359.

[7] Rex v. Jones, 1 Leach, C. C. 120.

others, does not show insanity which will render him incompetent to defend himself.[1]

§ 5. *How determined.*

The method of trial in a proceeding to ascertain the mental condition of the person accused of crime at the time of trial is within the discretion of the court in the absence of statutory provisions, but the most discreet and proper method is by trial by jury,[2] and trial by jury is the usual method,[3] either by the regular panel or another to be summoned for that purpose.[4] In Wisconsin and West Virginia another jury is required.[5] The burden of proof on such inquiry rests with the accused to show by a preponderance of the evidence that he is insane.[6]

But in determining whether reasonable doubt exists as to sanity at the time of the trial the court is not limited to the case made for the prisoner, but may in its discretion investigate the matter thoroughly and take into consideration all of the circumstances.[7] And the jury may form their own judgment of the present state of his mind from his demeanor during the inquest, though no evidence is given.[8] Under the Ohio statute the verdict need not be unanimous, a majority of three fourths only being required.[9] A judgment on such an inquiry is invalid unless notice was given to the persons affected by the proceeding, and the record recites the existence of every fact upon which jurisdiction is based.[10]

§ 6. *Effect and conclusiveness of the determination.*

Where one is found to be sane on a preliminary inquiry as to sanity at the time of trial, he is to be put upon trial under the

[1] Reg. v. Robertson, 1 Swin. (Sc.) 15.

[2] Freeman v. People, 4 Denio, 9, 47 Am. Dec. 216.

[3] See State v. Harris, 8 Jones, L. 136; State v. O'Grady, 3 Ohio Legal News, 137; Gruber v. State, 3 W. Va. 699; Dyson's Case, 1 Lewin, C. C. 64; Ley's Case, 1 Lewin, C. C. 144.

[4] People v. Farrell, 31 Cal. 576.

[5] Gruber v. State, 3 W. Va. 699; French v. State, 85 Wis. 400, 21 L. R. A. 402.

[6] State v. O'Grady, 3 Ohio Legal News, 137; Reg. v. Turton, 6 Cox, C. C. 385.

[7] State v. Arnold, 12 Iowa, 479.

[8] Queen v. Goode, 7 Ad. & El. 536.

[9] State v. O'Grady, 3 Ohio Legal News, 137.

[10] *Ex parte* Trice, 53 Ala. 546.

indictment at once, and if insane the result should be certified to the proper court having jurisdiction, where it will be made the foundation of an order committing him to an asylum.[1] And the trial of the question of guilt or innocence upon the indictment will not be postponed because of an appeal on the issue of insanity.[2] Nor will error committed on the trial of a question of present insanity constitute ground for reversing the judgment afterwards entered on the trial of the indictment.[3] So, the trial of such a collateral question is not the trial of the indictment.[4] And the result can have no legal effect upon the main issue.[5] And a finding that the accused was then sane cannot be taken into consideration upon the question of insanity set up as a defense to an indictment, and a refusal to receive evidence on the trial of the indictment of insanity at any time after the verdict upon the preliminary issue, and the exclusion of the opinions of medical witnesses formed from observation after that time is erroneous.[6] In Texas, however, all evidence of present insanity of the prisoner not intended to prove insanity at the time of the commission of the offense is excluded on the trial as to guilt or innocence, where the accused was found to be sane upon a preliminary inquiry.[7] And in Wisconsin, after the jury has failed to agree on the special issue, the issue of insanity cannot be again tried upon the trial of the principal issue.[8] But a finding by the jury impaneled to inquire as to sanity at the time of trial, that the accused was insane at the time of the offense, is a good defense in bar of a further prosecution therefor.[9] And where the jury disagree on the trial of a special plea the trial that follows is to be conducted in the usual manner, and the general verdict will be conclusive on the special plea of insanity.[10] And a verdict upon a trial as to present insanity is admissible on

[1] State v. O'Grady, 3 Ohio Legal News, 137.
[2] People v. Moice, 15 Cal. 329.
[3] Freeman v. People, 4 Denio, 9, 47 Am. Dec. 216.
[4] Freeman v. People, 4 Denio, 9, 21, 47 Am. Dec. 216, 220.
[5] French v. State, 93 Wis. 325.
[6] Freeman v. People, 4 Denio, 9, 47 Am. Dec. 216.
[7] Shultz v. State, 13 Tex. 401.
[8] French v. State, 93 Wis. 325.
[9] Gruber v. State, 3 W. Va. 699.
[10] French v. State, 93 Wis. 325.

a subsequent similar issue as tending to prove insanity at that time.[1] So the fact that it appeared to the court that there was a question as to the sanity of the accused at the time of the commission of the offense does not create a manifest necessity for the discharge of the jury within the meaning of a statute authorizing it in such cases; and in case of such discharge the accused cannot be tried again, but is entitled to his discharge.[2] Where one of two defendants jointly indicted is adjudged insane on a separate trial of that issue and ordered confined in an insane hospital, and the other is subsequently arraigned and tried alone, there is a severance of the issue.[3]

§ 7. *Insanity after verdict.*

A person though adjudged to punishment should not be punished for a public offense while insane.[4] And where one becomes insane after verdict against him, but before sentence, it is a good cause for staying the sentence.[5] And though no appeal of present insanity is interposed, and there is nothing to create a suspicion of such insanity, the appellate court may of its own motion inquire into the present mental state of the accused and make proper recommendation for commutation of sentence and removal to an asylum if he is found to be insane.[6] So, the court has power after the expiration of a term to reverse a judgment of conviction where it appears that the defendant was insane at the time of the trial and it was not then made known, and if such fact is disputed a jury may be impaneled in term to try the issue.[7]

The question in an inquisition of insanity after a verdict of guilty is whether the defendant was capable of comprehending the dangerous position in which he was placed, and of taking intelligent measures to meet it.[8] A plea of insanity as a bar to a

[1] People v. Farrell, 31 Cal. 576.
[2] Gruber v. State, 3 W. Va. 699.
[3] Marler v. State, 67 Ala. 55, 42 Am. Rep. 95.
[4] People v. Schmitt, 106 Cal. 48.
[5] State v. Brinyea, 5 Ala. 241.
[6] Green v. State, 88 Tenn. 634.
[7] Adler v. State, 35 Ark. 517, 37 Am. Rep. 43.
[8] United States v. Lancaster, 7 Biss. 440.

sentence, however, is only a plea to the humanity of the court to postpone punishment until a recovery takes place,[1] and if satisfied of the falsity of the plea the judge may pronounce sentence without impaneling a jury to ascertain the fact,[2] though in case of doubt or difficulty a venire should be awarded;[3] and a plea of insanity uncorroborated by affidavit must be disregarded where there is nothing in it to raise a doubt as to the prisoner's sanity.[4] So, a jury will not be impaneled to determine the sanity of one convicted of a criminal offense where the question of sanity was directly put in issue on the trial.[5] And evidence of insanity before conviction is inadmissible unless explanatory of subsequent acts.[6] And where the question of insanity has been passed upon by the jury no motion to stay sentence can be entertained.[7]

§ 8. *Effect of recovery.*

Insanity intervening between the time of the commission of the offense and the trial therefor does not exculpate the person.[8] And the accused is amenable therefor upon restoration to sanity upon the same footing as other persons committing criminal acts,[9] and may be required to plead and be put on trial upon his apparent restoration to sanity without making a formal inquiry as to his condition, and though the authorities of the asylum in which he was confined have not certified to his recovery.[10] No formal reversal or vacation of a previous judgment that he was insane is necessary.[11]

[1] Laros v. Com. 84 Pa. 200.

[2] People v. Pico, 62 Cal. 50; Bonds v. State, 1 Mart. & Y. 143, 17 Am. Dec. 795.

[3] Bonds v. State, 1 Mart. & Y. 143, 17 Am. Dec. 795.

[4] Com. v. Buccieri, 153 Pa. 535.

[5] Com. v. Baranski, 36 Pittsb. L. J. 363; Stover v. Com. 92 Va. 780.

[6] Spann v. State, 47 Ga. 549.

[7] State v. Brinyea, 5 Ala. 241; State v. Vann, 84 N. C. 722.

For Dr. Clevenger's comments on this subject, see *Insanity after Judgment*, including statement of case of Louis Lingg, chap. VI.

[8] Jones v. State, 13 Ala. 153.

[9] State v. Pritchett, 106 N. C. 667.

[10] State v. Pritchett, 106 N. C. 667; People v. Farrell, 31 Cal. 576.

[11] People v. Farrell, 31 Cal. 576.

VII. Incapacity of female which will affect rape.

Sexual intercourse with a woman who is so destitute of mind as to be incapable of giving consent is rape though she does not resist.[1] The test of mental capacity under this rule is whether she was capable or incapable of giving consent or of exercising any judgment in the matter.[2] And very slight proof of force is necessary where the woman lacks the intelligence to comprehend the nature and consequences of the act, and to distinguish morally and legally between right and wrong;[3] and when the man does not suppose that he has her consent the force required and which is involved in the carnal act is sufficient.[4] But where the will is active, though perverted, the act is not rape, when all idea of force or unwillingness is distinctly disproved.[5] And the mere fact that a woman is weak minded does not disable or debar her from giving consent to the act,[6] and intercourse with her when she was capable of exercising her will sufficiently to control her personal actions is not rape;[7] and if there is reasonable doubt whether force was used the jury should acquit though the woman was of weak mind.[8] A woman with less intelligence than is requisite to make a contract may consent to sexual intercourse so that the act will not be rape upon the part of the man.[9] And connection with a woman who is in a state of dementia, and not idiotic, but approaching toward it, having a predisposition to be with men and a morbid desire for sexual intercourse, is not rape when no circumstances of either force or fraud accompany the

[1] State v. Atherton, 50 Iowa, 189, 32 Am. Rep. 134; State v. Tarr, 28 Iowa, 397; McQuirk v. State, 84 Ala. 435; State v. Enright, 90 Iowa, 520; State v. Crow, 10 West. L. J. 501; Reg. v. Fletcher, Bell, C. C. 63, 8 Cox, C. C. 131; Queen v. Ryan, 2 Cox, C. C. 115; Rex v. Chater, 13 Shaw's J. P. 766; McNamara's Case, Arkley, 521.

[2] Reg. v. Barratt, 12 Cox, C. C. 498; Reg. v. Fletcher, 8 Cox, C. C. 131; Reg. v. Connolly, 26 U. C. Q. B. 317. And see Reg. v. Pressy, 10 Cox, C. C. 635; State v. Enright, 90 Iowa, 520.

[3] Stephen v. State, 11 Ga. 225.

[4] State v. Tarr, 28 Iowa, 397; Reg. v. Barratt, 12 Cox, C. C. 498.

[5] Crosswell v. People, 13 Mich. 426.

[6] McQuirk v. State, 84 Ala. 435; State v. Tarr, 28 Iowa, 397.

[7] State v. Tarr, 28 Iowa, 397.

[8] McQuirk v. State, 84 Ala. 435.

[9] McQuirk v. State, 84 Ala. 435, 437.

act;[1] nor is intercourse without resistance with a woman subject to epileptic fits, where the evidence does not show that she was under the influence of a fit at the time.[2] The burden of proof of insanity at the time of the act, and that the carnal knowledge was obtained by force and without consent, rests with the prosecution.[3] There must be some evidence that she was incapable from imbecility of expressing assent or dissent,[4] and when consent is given from mere animal passion or instinct it is not rape,[5] and a conviction cannot be sustained in the absence of evidence as to her general character for chastity and decency, or anything else to raise a presumption that she did not consent.[6] Evidence of the connection and the imbecility alone is insufficient.[7] But evidence of habits of decency raises a presumption that she would not have consented;[8] and in an Iowa case it was held that intercourse might be rape when it appears that the woman was of imbecile mind, and that there was nothing to indicate that she desired it or consented to it.[9] The rule is laid down by some of the cases under statutes defining rape to be sexual intercourse with a woman against her will by force, threats, or fraud, however, that no rape can be committed in the absence of force, threats, or fraud, whatever may have been the mental quality of the woman,[10] though under that rule, in estimating the efficiency of the resistance made by the female, her mental capacity is a proper consideration.[11] The introduction of the prosecutrix as a witness for the state, in a prosecution for rape in which it is

[1] Crosswell v. People, 13 Mich. 426.

[2] Baldwin v. State, 15 Tex. App. 275.

[3] Baldwin v. State, 15 Tex. App. 275, 283.

[4] Reg. v. Connolly, 26 U. C. Q. B. 317; Reg. v. Fletcher, 10 Cox, C. C. 248.

[5] Reg. v. Connolly, 26 U. C. Q. B. 317; Reg. v. Fletcher, 8 Cox, C. C. 131.

[6] Reg. v. Connolly, 26 U. C. Q. B. 317.

[7] Reg. v. Fletcher, 10 Cox, C. C. 248.

[8] Queen v. Ryan, 2 Cox, C. C. 115.

[9] State v. Tarr, 28 Iowa, 397.

[10] Baldwin v. State, 15 Tex. App. 275; Rodriguiz v. State, 20 Tex. App. 542; Crosswell v. People, 13 Mich. 427; Bloodworth v. State, 6 Bart. 621, 32 Am. Rep. 546.

[11] Baldwin v. State, 15 Tex. App. 275.

claimed that she is so mentally diseased as not to have power to oppose the act, is an indorsement of her competency, being in effect a statement to the jury that she was sane at the time of the events concerning which she is called upon to testify.[1] And a conviction will not be reversed when there is evidence of imbecility, though the evidence is conflicting.[2]

[1] Thompson v. State, 33 Tex. Crim. Rep. 472.
[2] State v. Enright, 90 Iowa. 520.

CHAPTER VIII.

CIVIL CASES.

Civil rights may be affected in many ways by mental conditions. Benefits are secured and responsibilities determined, as a rule, dispassionately, in civil cases when mental defects are under consideration, and the warped judgment so conspicuous occasionally in criminal procedure is seldom observed in civil cases.

Differences between medical and legal definitions introduce artificial difficulties in addition to those inherent in all that pertains to insanity. *Imbecility*, for example, in law may not only include general weakness of mind, which may be *ex nativitate*, as in the case of idiots, but dementia or the breaking down of the intellect caused by disease or old age. The medical use of the term "imbecility" is much more restricted, but its legal use, as noted, is more general. As distinguished from lunacy, imbecility was regarded in the law as without delusions or lucid intervals; and the test of imbecility consisted in the inability of the subject to transact the ordinary affairs of life, to understand their nature and effect, and to exercise will in relation to them. Some medico-legal writers have excluded idiocy and imbecility from insane states, and then, inconsistently and accidentally, mentioned imbecility as a form of insanity. The absurdity of such etymological quibbling is shown by an occasional overthrow of the old distinctions. In Iowa, for example, it was held that a person who was ordinarily called an idiot, but who only became imbecile after reaching the age of nine years, was not an idiot, but an insane person, under Iowa Code, § 1434, which restricted the term "idiot" to persons foolish from birth. *Crazy*, in a popular sense, imports a broken, shattered, or deranged mind, rather than one enfeebled by age or disease.[1] *Unsound mind*, as used in the Indiana statutes relating to guardianship, includes every species of insanity or mental unsoundness.[2] *Delusion* was considered to be not the only legal test for insanity.[3] *Moral insanity* was un-

[1] Shaver v. McCarthy, 110 Pa. 339.

[2] McCammon v. Cunningham, 108 Ind. 545.

[3] Manhattan L. Ins. Co. v. Broughton, 109 U. S. 121, 27 L. ed. 878.

derstood to be a morbid perversion of the moral feelings, without illusion or erroneous convictions. Walker[1] says, concerning this, that it has never been recognized in jurisprudence, and hopes that it never will be, because it would not only furnish universal apology for crime, but introduce the utmost uncertainty into civil transactions.[2] *Partial insanity*, for reasons given *supra*, may be considered as a useful legal expression, but one that is not countenanced by medical opinion, any more than the term "partial sickness."[3] *Lunatics*, in the English law, include persons of unsound mind and idiots.[4] *Mental enfeeblement* is stated by Clouston to be "a general weakening of the mental power, comprising, usually, a lack of reasoning capacity, a diminution of feeling, a lessened volitional and inhibitory power, a failure of memory, and a want of attention, interest, and curiosity, in a person who had those mental qualities and has lost them, or has come to the age to have them and they have not been developed."

The foregoing, in addition to what has been mentioned in the chapter on *Definitions* concerning *non compotes mentis*, unsoundness of mind, etc., will eventually be of more historical than medico-legal interest, for the looseness with which all such expressions have been used, in spite of frequent statutory attempts to limit their applications, breaks down distinctions and imitates popular usage. Here and there, in some civil proceedings, what is and what is not included in the terms "mental weakness," "unsoundness," and "*non compos mentis*," may have to be regarded; but the main point is that, although the mind of a person may be to some extent impaired by age or disease, still, if he be capable of transacting his ordinary business, if he understands the nature of the business in which he is engaged and the effect of what he is doing, and can exercise his will with reference thereto, his acts will be valid and binding.[5]

The bare fact of imbecility or other mental defect, in itself, does not warrant interdiction, isolation, or deprivation of the rights of citizenship. Every case must be determined upon its own

[1] American Law.
[2] State v. Spencer, 21 N. J. L. 207.
[3] Blakely's Will, 48 Wis. 294.
[4] 16 & 17 Vict. chap. 97.
[5] English v. Porter, 109 Ill. 285.

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merits; and not even degrees of imbecility can be arbitrarily created to include those who are not capable of managing their own affairs. Such things are matters of fact; the insanity and unsoundness of mind are related to the inquiry as bearing upon the extent to which they have actually caused business incapacity.

Political rights. The impropriety of permitting imbeciles to vote upon public questions is manifest at times; but where such defectives have not been legally declared to be such, no one can refuse them the privilege; and, notwithstanding the fact that imbeciles are easily led and may not exercise proper judgment in such matters, that fact can never be made a test of such rights, for multitudes of other than imbecile persons could be deprived of political rights for the same reason.

Impeachment or vacation of office, on the ground of insanity or mental disability, has at times become necessary; but this proceeding is liable to be instituted without cause; and the undeserved stigma of insanity has been fastened upon those only physically disabled.

Under contracts, conveyances, testamentary capacity, undue influence, etc., civil considerations as affected by insanity can be more conveniently discussed; many of the principles, however, being of general application.

Torts consist in acts constituting injuries to one's person, property, or reputation,[1] whether the responsibility is maintained or not. A lunatic is so far liable for his torts as to subject his estate to a suit for damages to others caused by its negligent management. On principle, however, he cannot be held liable for malicious acts in cases where he is not competent to intend wrong (*capax doli*).[2]

Defamation, libel, and slander, by anonymous letter-writing, or otherwise, have frequently been committed by insane persons of many kinds. At the climacteric and in hysterical mental states there is a proneness to this species of annoyance, and injustice is most apt to be done in hysterical instances because of the difficulty of recognizing the mental perversion at the root of such mischievousness.

Imbeciles and the circular insane are more apt to commit of-

[1] Addison, Torts, 53.

[2] Ewell, Lead. Cas. 635 *et seq.*; Whart. Neg. 87.

fenses against property rights. The principle which makes the lunatic who commits a trespass on the person or property of others liable in damages by a civil action was stated in *Weaver* v. *Ward*[1] as based on the injustice of allowing an innocent person to suffer by the acts of an insane person.

The litigious propensity of some paranoiacs has damaged the reputation and property of innocent persons, and this fact should be recognized and persecuted defendants relieved so that the law may not be the means by which the insane commit offenses.

False accusations and confessions of the insane have also occasioned damage to others. These acts are apt to be performed by persons during the mental derangements of puberty, the climateric, childbirth, and hysteria, as well as in paranoia, melancholia, and other insanities.

Punitive damages cannot be recovered from the insane for injuries. If actual injury is sustained, damages may be recovered for slanderous words spoken by a lunatic where the insanity is not so manifest and notorious that the words could produce no effect on the hearers. But insanity was held to be a good plea in defense to an action for slander.[2]

Contracts. As a general rule, insane persons are incapable of entering into valid contracts, and any agreements which they may make are either void or voidable. To invalidate such an agreement it must be shown that it was the direct result of the insanity alleged. Delusion or insanity unconnected with the act under consideration does not relieve. An agreement of an insane person immediately connected with and growing out of his insanity is voidable, and not void, except in certain cases. Transactions that are neither void nor binding must stand until they are attacked by some one whose position or interests warrant him in so doing.[3] In some states agreements with the insane are void under the statutes. Contracts for necessaries supplied in good faith to an insane person and suitable to his rank in life are an exception to the general rule of voidability. Where a person in good faith executes a contract with another who is apparently

[1] Hob. 134.

[2] Bryant v. Jackson, 6 Humph. 199. See also Horner v. Marshall, 5 Munf. 466; Yeates v. Reed, 4 Blackf. 463, 32 Am. Dec. 43.

[3] Campbell v. Kuhn, 45 Mich. 513, 40 Am. Rep. 479.

sane, and an adequate consideration is paid which cannot be restored so as to put the party *in statu quo*, the contract cannot be set aside by the lunatic or his committee.

It is not agreed among common-law expounders whether a person *non compos mentis* may be permitted to plead his own disability in avoidance of his contracts.

One of the logical results of the English attempts to separate unsoundness of mind from insanity appears in *Jenkins* v. *Morris*,[1] wherein rational letters with reference to a lease were written under a delusion that a farm was impregnated with sulphur, and it was held that, as it thus appeared that, in spite of the delusion, business ability remained, the mere existence of mental disease did not constitute unsoundness of mind. The lease was held valid, notwithstanding the fact that the delusion prompted the desire to lease the farm to get rid of the sulphur annoyance.

Insane persons are incapable of contracting during the disability. On this ground guardians are appointed to manage their concerns. But sanity is always presumed until insanity has been once established, after which the continuance of insanity is presumed until the contrary has been proved. The old doctrine that a man cannot be permitted to stultify himself—that is, to set up the defense of insanity—is now exploded. As to idiots the test is incapacity of understanding and acting in ordinary affairs of life. Mere mental imbecility not reaching this point will not invalidate a contract fairly made.[2]

Mere physical and mental weakness does not incapacitate.[3]

Promissory notes. The maker or indorser of a promissory note may be insane, and that fact may be set up as a defense to an action on the note. But where one in good faith takes a note signed by another of whose incompetency to do business he has no notice and in a transaction which is not likely to call his attention to it, he can recover on the note. Where, however, a promissory note payable in bank is given, upon an unexecuted consideration, to one who knows of the maker's disability, it may be disaffirmed, though it has passed into the hands of an innocent

[1] L. R. 14 Ch. Div. 674.

[2] 2 Walker, American Law, 471; 2 Kent, Com. 452; Dennett v. Dennett, 44 N. H. 531, 84 Am. Dec. 97; Bond v. Bond, 7 Allen, 1.

[3] DesMoines Nat. Bank v. Chisholm, 71 Iowa, 675.

purchaser. In such a case the purchaser of the note takes it with constructive notice of the maker's disability.[1]

Partnerships. The insanity of a partner, by English law, will not itself work a dissolution of the partnership. It is a ground for dissolution only; and if the continuing partner does not avail himself of it, it will be presumed that he is willing to wait to see whether the incapacity of his partner may not prove merely temporary. In some of the United States it has been decided that the insanity of a partner works the dissolution of the partnership.

Patents by English law may be granted to insane inventors.[2] Trademarks and designs are covered by the same law.

Conveyances. Idiots are utterly incapable of making a valid conveyance, and lunatics can convey only during their lucid intervals. But their guardians have the same power to sell real estate of their wards as guardians of minors, and are under the same regulations.[3]

The deed of an insane grantor is only voidable, and not void, in England and those of the United States in which the committee is held not to have an estate in the lands of the insane wards. In those states, however, in which conveyances by insane persons are declared void by statute, and in those in which the committee is vested with the legal estate of his ward, conveyances by an insane person after the finding of an inquisition and the appointment of a committee are absolutely void. In order to invalidate a deed executed by an insane grantor it must appear that the grantor was subject to insane delusions at the time, and that the insane delusion influenced him to do the act, or that he had lost all power of intelligently reasoning on any subject.

Ratification. Where the deed of an insane person is sought to be established on the ground that the grantor after his restoration to sanity had ratified it by receiving and accepting the consideration, it must appear that the ratification was the intelligent act of the grantor knowing that he was acting under the contract contained in the deed, and intelligently availing himself of the

[1] 11 Am. & Eng. Enc. Law, 143.

[2] Patents Acts 1883, § 99.

[3] Arnold v. Richmond Iron Works, 1 Gray, 434; Gibson v. Soper, 6 Gray, 279, 66 Am. Dec. 414.

provisions of the contract in his favor. Ratification may be inferred if the grantor after his restoration to reason takes advantage of the beneficial considerations contained in the contract of conveyance.

"A court of equity on good cause shown may set aside a voidable conveyance of lands by an insane person, and this may be done at the instance of the grantor himself when restored to reason, or by his committee or guardian, or by his executor, administrator, or heirs. . . . When a person while sane enters into an agreement to convey real estate, and afterwards becomes insane, equity will enforce the specific performance of the contract. But if the agreement is made while the person is insane, specific performance will not be decreed."[1]

It is of medico-legal importance to keep in view the fact that checks, contracts, conveyances, etc., may be signed by an epileptic without rationally intending to do so, and that important business transactions may be forgotten by an epileptic at a time when he is considered sane, and in the intervals between convulsions. Lucid intervals alleged to legalize transactions should be scrutinized with the greatest care. Paretic dements are quite prone to launch out into speculations and more extensive business generally, upon which during their sane lives they would not have thought of venturing.

Undue influence may operate in the matter of contracts as in wills; and the antipathies of mental weakness, delusions, etc., of the insane may, with or without further suggestion, influence the tenor of the contracts.

Marriages are apt to be unwisely projected or made by the insane; and it is noticed by alienists that imbeciles and other degenerates of opposite sexes are apt to be mutually attracted to one another. Sometimes the wealth of a senile dement may induce a female to overlook mental peculiarities; and designing women have frequently mated with such insane persons, often succeeding in ousting other relatives from consideration in the testamentary disposition of property by senile dements. Alcoholics during their trance states, and head injury lunatics, as well as paretic dements, the circular insane, etc., are liable to make unwise marriage arrangements, and sometimes when already mar-

[1] 11 Am. & Eng. Enc. Law, 149, 151.

ried. The absurd marriage plans of climacteric females and their persecutory attentions are recorded by most alienists, sometimes under ovarian or old maid's insanity. Breach of promise may become an issue in such instances. A person who is so insane as to be incapable of entering into a valid contract concerning property cannot enter into a valid contract of marriage. Mere weakness of understanding will not invalidate, nor will insanity which does not affect the subject-matter of the contract. The authorities are in conflict as to whether the marriage of an insane person is void *ab initio*, so that it may be impeached collaterally. This raises the questions of the legitimacy of children; whether annulment of the marriage is necessary or obtainable after death; the inheritance of estates, etc. Asylum superintendents are frequently asked as to the hopelessness of the insanity of wives or husbands by persons who wish to marry again.

In some states divorce is granted for habitual drunkenness for three years, and this may be equivalent to a legal separation from an insane person, not by reason of the insanity, but its cause.

In marriage, as in other contracts, it is required that each party should be capable of consent, or *compos mentis*, and therefore idiots and lunatics cannot marry.

Insanity may not be recognized until after marriage, or it may occur in some instances after the marriage, as in the so-called "connubial insanity," which is a melancholia from exhaustion.

Life insurance. Provisions in life-insurance policies against suicide are inoperative if the killing is the result of an insane impulse which deprives the assured of all ability to form a rational judgment as to the act he is committing; and the contract is therefore not avoided. In some cases it is held that if the person insured was conscious of the act he was committing, intended to take his own life, and was capable of understanding the nature and consequences of the act, the insurers will not be liable. But insanity may have induced the suicide in spite of such contingencies. When a policy provides that the contract shall be void in case the insured dies by his own hand, or commits suicide, the burden of proof is upon the party seeking to enforce the policy to show that the self-destruction was not the conscious and voluntary act of one responsible for his actions, but the involuntary act of an insane person.

Business competition, probably more than anything else, is inducing abandonment of restricting clauses as to suicide on policies; and it may be seriously questioned whether the act of suicide itself may not be urged as indicating insanity as properly as where in other civil cases the act itself is made the sole criterion. Certainly self-destruction is not an indication of sanity.

Insanity is not an excuse for the nonpayment of premiums. The propensity of paretic dements to secure insurance at the outset of their insanity does not indicate their recognition of insanity in themselves, in spite of the instance cited of a physician who sought voluntary seclusion for that form of insanity; as in the hypochondria that precedes many mental derangements there may be some recognition of the impending insanity, but the possibility of an insane person recognizing fully developed insanity in himself must be doubted.

Suicide. Tabulations by Morselli[1] indicate that the number of suicides has increased materially in the different European states. The statistics of an English deputy coroner[2] show that in 1861 there were sixty-seven suicides per million, and a steady rise to 1888, when the number was eighty per million,[3] male suicides being from two to four times more numerous than females. The temperate zone affords the greatest number of suicides, and the Germanic people are more inclined to self-destruction than the Latins. Inhabitants of mountainous countries are less suicidal than those of the plains. In opposition to the popular notion that November is the month that yielded the most suicides, statistics show that the maximum is in the warm season, decreasing through summer, spring, autumn, and winter.

Morselli shows that where crimes against property predominate over those against persons, suicides are more frequent, and that agricultural distress increases the number of suicides. During great political revolutions suicides decrease. Density of population increases the number. Self-destruction is most common between the ages of twenty-one and fifty, the maximum occurring between forty and fifty, but in England and Wales the maximum is from fifty-five to sixty-five. The lunacy rate falls in propor-

[1] Suicide, London, 1881.
[2] Suicide, by W. Wynn Westcott, 1885.
[3] Journal of Mental Science, Jan. 1890.

tion to population earlier than the suicide rate. Suicides by children five years of age are recorded. In France during a certain series of years noted by Morselli, the tendency to suicide was greatest at above seventy in both sexes, while crime was most frequent under twenty-five. Celibacy, though not so injurious to women as to men, increases the rate of suicide,—especially among the divorced. Women with children, either widowed or divorced, are restrained from suicide, while divorced men are prone to self-destruction. Unhappy marriages induce suicide in a large number of women.

In Italy the greatest number of suicides were associated with industries least necessary to human existence, such as the artistic and some manufacturing. Suicides were more numerous among wine merchants and beer-sellers than among tradesmen. Literary and scientific men, merchants and bankers, yielded a large proportion of suicides; lawyers and doctors the greatest number. Sedentary occupations lead to suicide more often than those that entail severe manual labor. Soldiers appear to have suicide suggested to them by their weapons, and large rivers give both opportunity and suggestion to those who live near them.

Suicide is more prevalent among the educated than the uneducated classes. Higher education is held as only indirectly responsible, though leading to less exercise and simplicity of living. Rates of increase of suicide and insanity appear to be associated.

Imprisonments, and particularly solitary confinement, increase the suicide rates. The use of alcohol or beer as a cause of suicide is not disputed. Böttcher, cited by Morselli, claims that 56 per cent of suicides are due to alcoholic excess. In Sweden the suicide rate fell with stringency of the prohibitory laws as regards drink. A tendency to suicide sometimes occurs in families, and the disposition may be inherited. Westcott claims that the "temporary insanity" verdicts of coroners' juries are no indication of the actual conditions in such cases. He traced 20 per cent of suicides to insanity, however.

Of male English lunatics, 25.8 per cent in 1887 manifested a suicidal tendency, and females were more numerous among these than males, while male suicides were in excess among the general population; 59.6 per cent were cases of melancholia; mania gave 20 per cent, and dements 16 per cent.

Hanging or throat cutting is more frequent among men, and drowning among women. Poisons are least used by both.

The regularity with which suicides occur under certain conditions points to the operation of a general law that enable us to make predictions under recurring circumstances. Morselli regards suicide as but one means of elimination of the weak in the struggle for existence.

Suicide may be committed by persons who have shown no other sign of insanity, and is more common in some forms of insanity than in others. The mania and paretic dementia suicides may be accidental, and in lesser mental disturbances a pretense of intention may result in actual suicide. Melancholia is the most suicidal form of insanity. Slight causes may precipitate the intention in weak-minded, ill-balanced people.

Impulsive or deliberate attempts may be made; the former most usually by "nervous" persons, the hysterical, maniacal, alcoholic, and epileptic. Suicide in children indicates bad heredity, as a rule. Delusions, hallucinations, and illusions have led to suicidal acts. Certain otherwise perfectly sane persons have uncontrollable impulses to throw themselves from a height, and doubtless suicides have been caused by such propensity, which may be called an obsession.

The periodical melancholiacs are persistently suicidal, and the insane with suicidal disposition are the most numerous in melancholia in general. Alcoholic and head injury insanity, with hypochondria, probably follow in frequency of self-destruction, though numerous other psychoses also exhibit the inclination. Senile dements, paretic dements, and the atheromatous insane, in the beginning of their disorders, are also thus disposed when they recognize the fact of mental failure. Climacteric, puerperal, transitory frenzy, epileptic, delirium grave, maniacal, and ordinary delirious patients may accidentally destroy themselves. Paranoiacs and hysterical persons have done so when they fancied it would add to the "glory" of the cause they represented. Rheumatic and gouty persons during depressed stages of their disease have been suicidally inclined, and even stupid terminal dements with accesses of frenzy have become homicidal and suicidal unexpectedly.

Occasionally the insane mutilate themselves terribly, and in a

great variety of ways, as by gouging out their eyes, cutting off their hands, arms, or tongues, or gashing themselves about the person generally; some have castrated themselves, and after or during these mutilations they have succeeded in killing themselves. Upwards of thirty self-inflicted wounds were found on the person of a suicide.[1] A maniac reported by the same author[2] had twenty-two wounds on his chest and many distributed about his arms, neck, and face. One wound had penetrated the heart. Beck[3] reports a suicide who inflicted at least a hundred wounds on himself. Numerous other instances abound in medical and medico-legal records.

The cunning practice of lunatics in attempts at suicide is mentioned by Ray.[4] Such "are known to employ wonderful address in procuring and concealing the means of self-destruction; pretending to have seen the folly of their designs, and to have renounced them entirely; sending away their attendants after thus lulling them into security, and, when least expected, renewing their suicidal attempts." Ray[5] also fully discusses the subject of suicide from the information available in his time, and classifies suicides according as they have deliberately committed the act from the force of moral motive alone, or have been influenced to do so by disease. He mentions two youths who, after dining sumptuously, suffocated themselves in the same bed, as instances of strong passion sufficing for the purpose. He speaks of the existence of suicide clubs, the members of which bind themselves to die by their own hand within an appointed time, and of "men who, with cultivated intellects and refined passions, but entertaining only the meanest conception of the great moral purposes of life, may be ready to terminate their existence the moment it ceases to impart its usual zest to sensual gratification." He assigns moral depravity, rather than physical disease, as at work in such instances.

Some persons who have been prevented from carrying out suicidal designs have declared that they had no recollection what-

[1] Taylor, Medical Jurisprudence, 281.
[2] Taylor, Medical Jurisprudence, 205.
[3] Medical Jurisprudence, 69.
[4] Op. cit. p. 35.
[5] Op. cit. §§ 474–488.

ever of any such attempt; and it is reasonable to suppose that this is true in instances where consciousness is at fault, as it is in so many mental derangements.

Epidemics of suicide have taken place through imitative tendencies. Thirteen hundred persons destroyed themselves in Versailles in 1793, and in 1506 sixty killed themselves in Rouen.[1]

Ray thinks the survivor of an agreed-upon, mutual, murderous attempt should be held for manslaughter, in opposition to Mittermaier's idea that he would not be a fit object for punishment.

All writers on the medical jurisprudence of insanity have mentioned the potency of grief, or overwhelming sense of catastrophe, as effectual in not only causing suicides, but multiple murders, sometimes the destruction of an entire family by a melancholy laborer, or other person who is out of work; and frequently these murders and suicides are calmly and deliberately planned, without raising suspicion of the intention.

Morselli's statement that the working classes are less prone to suicide should be modified by mentioning that, while busily engaged, they may be less disposed; but when out of employment laborers, as well as farmers who are suffering reverses, add to the number of suicides.

Even animals have been recorded by zoölogists as occasionally killing themselves, either in sudden passion or deliberately. Dogs and horses have been said to commit suicide from fear and grief, and probably most often in consequence of prolonged physical suffering.

Trivial causes are sufficient in some persons to cause suicide. An interesting case is reported of a deliberate and concealed suicide intended to cover systematic embezzlement.[2]

Conservation of persons and property is often rendered necessary by insanity; and the equity considerations involved fall within the jurisprudence of chancery, probate, and other courts. Reckless squandering of property is common during alcoholic and many kinds of insanity. Alcoholics, paretic dements, and maniacs have torn up, burnt, or thrown away large sums of money. Paretic dements, circular insane patients, and others,

[1] Burrow, Commentaries on Insanity, 438.

[2] 1 Whart. & S. op cit. 425, 823.

have dissipated their own fortunes and those they were able to control; and frequently bankruptcy has resulted or embezzlement has been committed before legal steps were taken to prevent losses through insane acts. Senile dements may, because of delusions and miserly habits, be improper persons to entrust with their own property, or even their own lives, which may be forfeited by voluntary starvation in the midst of abundance.

Imbeciles may not be deprived of the management of their property on the ground of mental deficiency alone; some overt act of extravagance or indiscretion, or other cause should indicate that an imbecile, paranoiac, or other person who, though known to be "queer" or insane, has heretofore transacted business for himself, is incapable of managing his affairs. Haslam's suggestion[1] that the imbecile should be tested as to his ability to discriminate in the values of separate units is of no use, for an imbecile may have a prodigious calculating power, and yet be unable to apply it to pecuniary matters. Besides, considerable money-making capacity may coexist with much mental degeneracy. If mere extravagance and mismanagement on the part of a sane person does not justify interference, the fact of feeble intellect of itself should not suffice; but where feebleness of mind or insanity is likely to result in the loss of means of support, to the detriment of the infirm person or those dependent on him, conservation would be fully justified. There can be no possible test applicable to all cases nor even to any class of cases, such as imbecility; for the circumstances and capacities vary within extensive limits, and every case must be judged on its own merits. A court of equity adapts its decrees to all the variety of circumstances which may arise, and adjusts them to all the peculiar rights of all the parties in interest; whereas a court of common law is bound down to a fixed and invariable form of judgment in general terms.[2] In all questions of insanity it would be well if the latitude of equity proceedings were allowed to influence the common-law decisions, to the extent, at least, of acknowledging the impossibility of regulating the entire matter of mental phenomena by "rule of thumb." When it is necessary to interdict, to commit an insane person, or to appoint a conservator, much

[1] Medical Jurisprudence, 347.

[2] Pomeroy, Equity Jurisprudence, § 146.

depends upon individual peculiarities in each case, almost impossible to summarize, though the characteristics of certain classes of lunatics may serve as a guide to what the insane person is likely to do, or to explain what he has done as consistent with insanity.

An imbecile may converse rationally upon familiar subjects, and yet be incapable of much thought, judgment, or reflection. The question should be confined to his ability to manage affairs sufficiently. Theories and inferences to that end have been demolished repeatedly. The money making and retaining ability is not an exalted one, and many imbeciles possess it in the absence of many other faculties. Cerebral neurasthenics, with any of the obsessions or propensities, are able to convince any court of their ability to regulate their own affairs, and often to take precautions against too severe consequences of their impulses.

While it often happens that in acute cases of insanity precautions against the dissipation of means have been neglected too long, on the other hand ordinary signs of senility have been mistaken for insanity, with the result of depriving a perfectly competent aged individual of his home and other rights, often at the instigation of mercenary and heartless persons. A jury may be able to tell whether one is mentally capable of managing his affairs; but whether the technical phraseology "unsoundness of mind" should apply, also, is a different matter if hedged in by legal distinctions as to what that may be.[1]

That a knowledge of the symptoms of insanity is essential to intelligent action in all matters pertaining thereto is well known to judges of county, probate, and chancery courts, who come in such frequent contact with insanity cases as to be startled into finally recognizing the similarity of symptoms, and particularly the delusions, of certain classes of insane. Were this little knowledge of the judges built upon by careful study of the entire subject, equity in insanity questions would be immeasurably aided. At least, what information the courts have obtained through experience should suggest to them the strong probability that there is a fairly well developed and accessible science of psychiatry, which could be made available.

That idiots and lunatics are incapable of being executors or administrators was settled as early as the reign of William and

[1] Ray, op. cit., § 6, p. 9.

Mary;[1] and also that if an executor became *non compos* the administration could be committed to others.

The guardian, committee, curator, or assignee in lunacy, may contest before the proper court his ward's prior dealings, and may either disavow and rescind or ratify the lunatic's contracts made during lunacy.[2] After the recovery, conservators occasionally have personal interests at stake in seeking further control of the former insane person's property, and may contest the alleged recovery.

Commitments are regulated by legislative enactment, and vary widely in the different states, and change from time to time, so that a statement of procedure might not be correct for any length of time. Most of these statutory provisions are based upon the popular idea, derived from sensational novels, and fostered by the lectures and lobbying of hysterical and paranoiac persons, that incarceration of sane persons are frequently made by relatives and others to obtain possession of property wrongfully. The officials of public asylums can be depended upon, as a rule, to promptly detect and remedy any such wrongdoing, and no experienced alienist is likely to keep a sane person in durance. Granting that collusion of the kind may be liable to occur in private asylums, and even rarely in public institutions, some other mode of inquest should be instituted than that of haling sick unfortunates into open court as though they were criminals. Such procedure has made some cases of insanity permanent which would otherwise have recovered, and it is as much of an interference with private rights as is imprisonment without warrant. The aversion of friends of the insane to public trials of ten delays proper treatment.

Where the provision is made that a trial by jury must be had if the patient prefers it to a commission, experience shows that the insane person, with his foggy ideas of why he is arraigned at all, demands the jury trial in a large majority of cases. The jury and court inquests might be well enough if they could be conducted without the damaging publicity of open court proceedings, and in such a way as to protect the person on trial from injustice, and at the same time with proper regard for the feelings

[1] Hills v. Mills, 1 Salk. 86.

[2] 2 Bl. Com. 292.

of the invalid, whose fancies often see occasion for terror in smaller things than being brought before a judge, jury, and mob of sometimes offensive spectators.

Evidence. It should no longer suffice that a medical witness may assert his belief in the sanity or insanity of a person. Reasons for such belief should be elicited from him, based upon the symptoms of the kind of insanity, if any is claimed. The following questions should bring out the knowledge of the witness: What is the name of the ailment? What are the symptoms of that disorder? What evidences of such symptoms did you discover in this case? What method did you use to ascertain these symptoms? With what authors on insanity are you familiar? These few questions suggest and open up means of asking others, which will show whether the witness knows what he is talking about, whether he is sincere, prevaricating, or mistaken, informed or otherwise.

Falsifying experts may be readily discomfited by being confronted with records of their testimony in previous cases; "chronic witnesses" for the sake of fees, when impelled by no better motive, are sure to leave traces of reckless testimony, the use of which in examinations will do more to evolve a decent expert system than all the theoretical methods that have been suggested. Instead of the puerile assumption that "all experts are unreliable," the truth of the matter is that one who makes claims to special knowledge may be, like any other person, good, bad, or indifferent, honest or dishonest, skilled, learned, or a mere pretender to skill and learning. Experts may include jurists who are experts in law, mechanical and civil engineers, physicians and editors, or artists,—in fact, anyone who is presumed to have special information. It is a precept with lawyers that the plain truth enables a witness to stand unshaken on cross-examination, and an expert who has earned a reputation for dealing in truth comes to be respected by bench and bar, and is usually not cross-examined to any extent, for fear that he will make his case stronger. Judges readily learn who are fair witnesses, and often charge the jury strongly accordingly. In time lawyers will bring their cleanest and best cases to such expert; but he will not be called into court where the services of a hard swearer are considered necessary; and hence from a business point of view the medical prostitute

may have more pecuniary success than, though not the self-respect of the expert who cares more for that than money. When piracy was quasi-respectable, its conscientious opponent had to stand sneers at his want of business practicality. Sweeping generalizations do not become an enlightened age; all experts are not dishonest any more than all judges are unjust. Tailors, printers, and hatters are not all drunkards, as unthinking popular expressions assert, any more than all preachers are hypocrites or all lawyers knaves.[1]

Habeas corpus proceedings, in the experience of alienists, are most often sought by insane persons who are least fitted to be at large. Alcoholic, paranoiac, and circular insane cases, who make themselves not only nuisances, but dangerous to others, are most persistent in resorting to every method of regaining liberty, and ignorant sympathies are frequently brought to their assistance. Many tirades against "unjust incarcerations of sane persons" have been instigated by sensational newspaper and other reports, some of which emanate from insane persons. The public prefers to be startled into indignation over matters that accord so readily with its crude conception of insane asylum affairs, and there is but little inducement for newspapers to get at the truth of such matters. Could intelligent investigation of the real wrongs of the insane be made, there would be ample reason for public indignation; but the difficulty of understanding the merits of the subject operates in favor of hysterical sensationalism, and the exercise of much reason is not to be expected of the average public mind.

Personal injury resulting in insanity, particularly when the head has been hurt, is the basis of claims for damages against railways and other corporations, or private persons. In the chapter on *Head Injury* the after-effects of such accidents are detailed,—as, speech derangement, epilepsy, insanities of various kinds, with homicidal and suicidal propensities, or at least considerable mental and bodily suffering. Proneness to alcoholism, over-susceptibility to heat, headaches, irritability, memory impairment, eyesight and hearing defects, often arise from head injuries, with the liability that insanity may develop in after life. The effects of injuries to the spine I described in a medico-legal treatise.[2]

[1] For legal discussion as to Evidence, see chap. X.

[2] "Spinal Concussion," Philadelphia, 1889.

Whether an injury has been sustained or not is often extremely difficult, and occasionally impossible, to determine, owing to the subjectivity of symptoms, or the absence of anything that can be demonstrated to a jury, and the lack of any evidence except the claimant's own statements. The consistency of the symptoms with what has been known to exist in other cases is often the main evidence, the value of which, and the possibility of simulating or malingering, can best be judged by physicians experienced in such matters.

Objective signs, symptoms, or indications are demonstrable independently of the patient's statements. For instance, loss of legs, arms, eyes, a mutilation, or depressed skull-bone, are objective.

Subjective symptoms are not demonstrable, and require the patient's description. A headache, pains in general, memory impairment, physical debility, etc., are subjective, and may be simulated.

A malingerer, in military and legal parlance, is one who pretends to be suffering from a disability, or creates a real disability for purposes of fraud.

There are objective manifestations of subjective symptoms,—as, the stagger, the rigidly maintained spine, and other outward indications of suffering or disability, but these also may be simulated. Some otherwise subjective states are convertible into practically objective states by resort to scientific methods. Thus, an alleged paralysis, which can otherwise neither be proved nor disproved, may by electro-diagnosis be determined positively as false or genuine. But the experts capable of making electrical examinations are not numerous. Sleeplessness is often affirmed as one of the symptoms of the injury. When the plaintiff states that he suffers from insomnia, failure to corroborate the statement by the observation of others would make the sleeplessness subjective; but in a hospital, where nurses can record the behavior of patients, night after night, testimony to the effect that the patient did not sleep would be all important; and when relatives and friends can furnish similar testimony the result is practically the conversion of the subjective into an objective symptom. General emaciation, or diminution of bulk of particular parts, as in atrophy of the limb, tremors or twitchings, flushings,

rapidity of heart, excessive sweating, sometimes of half of the body, cold extremities, blueness of the skin, due to imperfect circulation, dilation of the pupils, and the reflexes,—are all objective evidences, and tend to increase belief in the genuineness of the associated subjective symptoms. Even subjective symptoms can be set forth in such a way as to make their existence a probability, or to show their improbability. Diseases are determinable by grouped characteristics, capable of analysis and description; and one complaint differs from another as a horse shoe does from a watch, the component parts of either of which may be described.

There is sometimes considerable difficulty in presenting the consistency of the plaintiff's narration of symptoms, for the statement of a patient made to a physician at the time of examination may, under some interpretations of the law, be suppressed, and under others be considered as admissible. As the doctor sifts the reality of complaints in the light of his experience and knowledge, shutting off a description of the medical analysis may practically rule out all medical evidence. A plaintiff with a great hole in his skull in which the brain could be seen pulsating was allowed to describe his symptoms on the witness stand in his own unintelligent way, while the examining physician was debarred from discussing these same symptoms from a medical point of view, because his knowledge was based upon the statements of the patient at the time of the examination. In other cases no objection has been made to the fullest explanation of all that pertained to the case, however it may have come to the attention of the physician. "The declarations of a patient to his physician respecting his condition and symptoms at the time of seeking medical aid are admissible as evidence in his behalf, under a well-settled exception to the rule excluding hearsay. . . . The exception originally rested on the ground, first, that as the common law forbade parties testifying, the facts involved could not be proved in any other way; and, second, that the patient's interest in the physician's opinion precluded danger of falsehood. The modern practice of admitting parties as witnesses has removed the first of these grounds; but this is not considered a sufficient reason for excluding the testimony. To render it admissible, however, the plaintiff must establish the fact on which the exception rests, that is, that the declarations were made when

seeking medical aid."[1] This was an action brought to recover compensation for personal injuries sustained in a railroad accident. The only contest was over the amount due. The plaintiff called as a witness a physician of great reputation as a medical expert, who had examined him professionally a year after the accident, when his condition was much improved, and asked him to state the former's declarations at the time respecting his condition and symptoms, past and present, together with his own opinion based on these declarations and the personal observations made. This testimony the court holds should have been excluded because the inference was irresistible that the plaintiff did not call to consult the doctor with a view to medical aid, but to employ and qualify him as an expert to assist in maintaining the pending suit. Still, the court holds that the doctor's opinion might have been taken hypothetically,—based on his observations and the facts embraced in the plaintiff's statements. Whether the admission of such opinion should follow or precede proof of the supposed facts would have been a matter of discretion; but until the facts were proved the opinion could not be considered, and if its admission preceded the proof it should have been ruled out if the proof did not follow. The opinion being inadmissible, nothing indicating how much it rested on the declarations and how much on personal observation, it must be accepted or rejected as a whole.

Testamentary capacity. An early English definition of testamentary capacity in mental disease was made in *Combe's Star-Chamber Case:*[2] "That sane memory for the making of a will is not at all times when the party can speak 'yes' or 'no' or had life in him, nor when he can answer to anything with sense, but he ought to be of judgment to discern, and to be of perfect memory; otherwise the will is void." Gradual modifications were made, and the medico-legal relations of lucid intervals, insane delusions, and insanity generally, were more or less clearly formulated in early case-law. Lord Cockburn[3] states the rule thus: "That a testator shall understand the nature of the act and its effect; shall understand the extent of the property of

[1] Delaware, L. & W. R. Co. v. Roalefs, 70 Fed. Rep. 22.
[2] Moore, 759.
[3] Banks v. Goodfellow, L. R. 5 Q. B. 549.

which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison the affections, pervert his sense of right, or prevent the exercise of his natural faculties; that no insane delusion shall influence his will in disposing of his property, and bring about a disposal of it which if the mind had been sound would not have been made." An ancient work[1] admits testamentary capacity even "if a man be of mean understanding, neither wise nor foolish, but indifferent, as it were between a wise man and a fool; yea, though he rather incline to the foolish sort, so that for his dull capacity he may be termed *grossum caput*, a dunce, such an one is not prohibited to make a testament, unless he be yet more foolish, and so very simple and sottish that he may easily be made to believe things incredible or impossible,—as, that an ass can fly, or that trees did walk, beasts and birds could speak, as it is in Æsop's Fables." In *Whitney* v. *Twombly*,[2] the following instructions to the jury were sustained by the supreme court: "Soundness of mind such as will enable a person under the statutes to make a will has relation to the business to be transacted: namely, the disposition of her property by the will. Her mind must have been sound with reference to whatever is involved in this transaction; that is to say, she must have been able to understand and carry in her mind in a general way the nature and situation of her property, and her relations to those persons who are about her, to those who would naturally have some claims to her remembrance, to those persons in whom and those things in which she has been mostly interested. She must have been capable of understanding these things, and the nature of the act she was doing, and the relation in which she stood to the objects of her bounty and to those who ought to be in her mind on such an occasion, and free from any delusion which has the effect of disease, and which would or might lead her to dispose of her property otherwise than she would have done if she had known and understood correctly what she was doing. . . . All the testimony covering the whole latter portion of her life,—as to her relations and degree of intimacy with her brothers and sisters and nephews

[1] Swinburne, Wills, 4.

[2] 136 Mass. 145.

and nieces; as to what she said and what she did; as to her peculiarities, if you find that she had any, as to her disposition and temperament, her griefs and bereavements, her attacks of sickness, whatever you may find them to have been, her habits and manners as to what you may find that she was not able to do and what she was able to do, may be considered so far as they will aid you in determining her condition of mind on January 2, 1877. Age is not of itself a disqualification, but it excites vigilance to see if it is accompanied with incapacity. Disease is not itself a disqualification, but all infirmities awaken caution to see if mental capacity is impaired or gone."

The definition of testamentary capacity is a matter of law for the court. The sufficiency of the evidence must be passed upon before submission to the jury; and it is error to submit the question to the jury if there is no evidence that the incapacity existed. It is not to be assumed that it is possible in all cases to ascertain, beyond doubt, whether a testator was in possession of a disposing mind or not. Probabilities have to be weighed in many instances and allowed to determine matters, precisely as is necessary in most human concerns. When the symptoms pertaining to certain mental ailments are understood, the prospect of more intelligent judgment concerning the capacity for particular acts is brighter.

Testamentary capacity requires that in order to make a valid will a testator must have sufficient capacity to comprehend the nature of the act he is performing; he must understand the extent of his property of which he is disposing; he must comprehend the relations which he holds to those who have claims upon him, and be capable of making a rational selection among them. An insane person can make a valid will if, in spite of his insanity, he has a disposing memory, judgment, and will, as defined above, or is enjoying a lucid interval at the date of its execution. Similarly, a delusion foreign to the subject-matter of the will would not destroy its validity. Recovery of testamentary memory, judgment, and will, are the essential matters in consideration of a lucid interval which may imply complete restoration of mental vigor.[1] Neither subsequent suicide nor supervening insanity will be reflected back upon previous eccentricity so as to invalidate a

[1] Dyce, Sombre, v. Solaroli (1856), per Sir John Dodson, 1 Deane, 110.

will;[1] but previous insanity modifies this rule.[2] Moral insanity does not invalidate a will.

Upon the executor propounding a will rests the burden of proving testamentary capacity, knowledge, and approval of its contents, and due execution; and the American case, *Crowinshield* v. *Crowinshield*,[3] is cited as stating this rule clearly: "The heir at law rests securely upon the statutes of descent and distribution until some legal act has been done by which his rights under those statutes are lost or impaired."

Degrees of capacity. The law seems to require less mental power for the execution of a will than for making a contract. In *Harrison* v. *Rowan*[4] the court said that a testator's capacity may be perfect to dispose of his property by will, yet very inadequate to the management of other business,—as, for instance, to make a contract for the purchase or sale of property. For most men at different periods in their lives have meditated upon the subject of the disposition of their property by will, and when called upon to have their intentions committed to writing they find much less difficulty in declaring their intentions than they would have in comprehending business in some measure new.

The same degree of mental capacity is not required in making a will of a small and simple property as of a large and complicated estate.[5]

A disposing mind does not necessarily mean a sound mind.[6]

To compare one mind with another is a task that is beyond the power of the average juror, and Ray[7] maintains that "justice merely requires that the strength of the mind should be equal to the purpose to which it is applied," and that if this simple principle is distinctly presented to the minds of the jury, there are few so dull as to be unable to give it practical application.

Unnatural disposition of property tends to prove lack of tes-

[1] Hoby v. Hoby, per Sir John Nicholl, 1 Hagg. Eccl. Rep. 146.

[2] Symes v. Green (1859), 1 Swab. & T. 401.

[3] 2 Gray, 526.

[4] 3 Wash. C. C. 585; See also Brinkman v. Rueggesick, 71 Mo. 553; but, *contra*, McElroy v. McElroy, 5 Ala. 81.

[5] Sheldon v. Dow, 1 Dem. 503.

[6] Freeman v. Easly, 117 Ill. 317.

[7] Op. cit. § 367, p. 383.

tamentary capacity,[1] but giving the property to a stranger, rather than to a relative, does not, without more, evidence a want of testamentary capacity.[2]

Old age. Extreme old age, even when accompanied with disease, is not in itself evidence of testamentary incapacity. Chancellor Kent[3] stated that the will of the aged man "ought to be regarded with great tenderness when it appears not to have been procured by fraudulent arts, but contains those very dispositions which the circumstances of his situation and the course of the natural affections dictated."[4] Ray remarks:[5] "A judge is seldom required to decide questions of more delicacy—questions that demand such nice and cautious balancing of evidence, such penetration into motives and biases, such a profound knowledge of the mental manifestations as affected by disease—than those of mental capacity in old age, where the mind is confessedly laboring under some kind or degree of impairment. The standard by which witnesses' opinions are formed in such cases is so different, and the pertinacity with which each one clings to his own conclusions in proportion generally to his ignorance of the subject is so strong, that nothing but a great display of the above-mentioned qualities will enable the judge to perform his duty with credit to himself and satisfaction to others. Unless he can state the grounds for his opinions, they are no better than surmises, and he fails of accomplishing one of the most desirable objects of the law,—that of establishing and confirming the popular confidence of its decisions. Difficult as this duty is, it will be very much lightened by attending to some of those points which can always be ascertained, and which have an important bearing on the question at issue."

The characteristics of senility, and wherein it differs from the insanity of old age, senile dementia, are described in the chapter entitled *Age*.

Memory is requisite in the making of wills, and relatives may

[1] Lamb v. Lamb, 105 Ind. 456; Caldwell v. Anderson, 104 Pa. 199, *et seq.*

[2] Den, Trumbull, v. Gibbons, 22 N. J. L. 117, 51 Am. Dec. 253.

[3] Van Alst v. Hunter, 5 Johns. Ch. 160.

[4] For further discussion and citation of authorities on questions of testamentary capacity, see chap. VII., V.

[5] Op. cit. § 358, p. 370.

for the time being be forgotten, as, where there are numerous persons to be recollected. There are veritable stages of this, as well as other matters of senility. Some days the senile dement may be better as regards memory and intellect than usual. By one unfamiliar with the propriety and necessity of protecting the right of property disposal as far as possible, even after mental failure has begun, the intent of the law is not appreciated as it should be; and it would seem puzzling that some aged persons may be bereft of testamentary capacity, while some senile dements, and occasionally other insane persons, are permitted to make wills which are considered valid.

Imbeciles afford every grade of intelligence below the normal, and education, station, resources, etc., modify the aspects of their mental deficiencies, so that no possible standard can be invented that will divide imbeciles, even with approximate correctness. Hoffbauer's suggestion of three stages of imbecility failed, as some superiority of intellect would be included in an inferior grade, and *vice versa*. Imbeciles have their attachments and are as likely as anyone to leave property accordingly as they bestow their affections.

All that is required to establish the wills of people of weak understanding is that they should have been capable of comprehending their nature and effect,[1] of course in the absence of undue influence. "Nothing can be more unjust than to infer imbecility in general from facts that establish its existence merely in regard to certain subjects or relations. No one imagines a general or a statesman to be necessarily *non compos* because the latter may have shown himself incapable of conducting a campaign, and the former of controlling the destinies of an empire. And nothing can be more absurd as well as unjust than to conclude that because a weakminded person can be shown to have acted shrewdly in small and familiar matters, he must possess a legal capacity for the transaction of the most important and complicated affairs. Many an imbecile is perfectly competent to purchase the necessaries of life or make contracts relative to personal service, who could not be trusted with the disposal of an estate or with making an investment of money. We cannot help concluding, therefore, that the universal application of the rule

[1] Shelford, Lunacy, 275.

compos and *non compos* is repugnant to the most obvious principles of justice."[1] The principle[2] that no distinction in law need be made between important and common affairs, large and small properties, is erroneous.

Occasionally, as a test of observational powers, in which it is erroneously imagined to be the memory that is involved, questions are asked imbeciles or others to ascertain how far they may be familiar with certain matters of everyday occurrence. The value of this test may be seen by asking a roomful of company to draw from memory diagrams of their watch faces, taking the precaution to see that no one takes a glance at his timepiece to refresh his recollection. The majority, unless previously informed of the test, will insert the comparatively modern Roman figure IV in place of the older IIII, and almost invariably the VI will be represented, when the second-hand dial displaces that symbol.

In insanity generally, varying degrees of testamentary capacity may be noted, according to the profundity of the derangement, its duration, or the stage from inception to convalescence. In the beginning of mania, wills may be written which would be repudiated after recovery. Epileptics may make either proper or improper wills according as the disease influences their minds. Usually the character of the phraseology, spelling, etc., would indicate something in such cases, as words or letters would be omitted, or entire lines be left out, or some other peculiarity might point to the mental obscuration of epilepsy; but this is not invariably the case, for during the unconsciousness of alcoholic or epileptic occasions very lucid and legible documents have been written by such persons.

The effect of delirium upon testamentary capacity is fully quoted from Ray in the chapter on *Vesanias*. There is danger in this state of making a coherent will which would not be approved by the sane person when in full possession of his faculties.

Lucid intervals in intermittent insanity invert the order of proof and presumption; habitual insanity requires that the party who would take advantage of the fact of an interval of reason

[1] Ray, op. cit. § 125, p. 146.
[2] Story, Com. Eq. 238.

must prove it.[1] A restoration of the faculties at the very period of executing a will must be shown.[2]

Physical disabilities are frequently misinterpreted as indicating mental disease when such may not have occurred; and usually when the speech faculty is not deranged an estimate of the mental condition may be obtained as disproof of an assumption that the mind is impaired; but when speech happens to be involved, as after a paralytic stroke, it is not so easy to tell whether mentality is involved in the change, or not. Speech faculty loss or impairment is not necessarily accompanied with mental disturbance, though it may be and often is so associated. Physical disabilities may threaten to involve the mind, and even a matter so little noticed as the obstinate constipation of an old person, sometimes to the extent of going ten or more days without a movement, is a serious menace to the integrity of the circulation, for apoplexy has frequently resulted from such neglect or disability. Actual disease of the brain does not necessarily incapacitate from disposing of property, and a ruptured blood vessel in the brain, or other damage to the seat of intellect, may impair only some physical function, or it may also involve the mind. Testamentary capacity may exist in spite of hemiplegia with aphasia; but whenever the speech faculty is disturbed, in damage to the brain, there is danger that the mind is also involved, though it may be shown that such is not the case. Right-side paralysis in a right-handed person is of more importance than left-side paralysis in the same person, as far as mental capacity is concerned. The speech is not affected in left-side paralysis unless the person is left-handed; and hence the mental operations, with which language is so intimately connected, escape impairment in paralysis of the left side of a right-handed person. But every case should be separately considered, as there may be conditions and complications that apparently or really change the rule. Medical works generally will be found to sustain the view that the mind is not impaired in paralysis, especially of the left side, after recovery from the apoplectic shock which may have been induced by the paralysis.

Gowers[3] states: "One aspect of the question of speech defect

[1] Jarman, Wills, 72.
[2] Halley v. Webster, 21 Me. 461.
[3] Diseases of the Brain, 146.

is of considerable practical importance: its relation to the capacity for making a will. In pure motor aphasia, in which the auditory word processes are intact, words that are heard are perfectly understood, and assent or dissent can be expressed, although only by gesture, the patient could certainly make a will. If there is considerable word deafness, it is always so doubtful whether the meaning of what is said is correctly perceived that there is probably no testamentary capacity unless written words are perfectly understood, and all communications are thus made. *A fortiori*, if there are both word deafness and word blindness, a valid will could not be made."

"Paralysis agitans (shaking palsy, or Parkinson's disease), as well as chorea, or St. Vitus' dance, or another disorder known as multiple cerebral sclerosis, may, each and all of them, so interfere with rational control of the body and limb movements as to give an appearance of mental disturbance, when the mind is usually perfectly clear in such ailments. I have known cases of chorea to be associated with insanity, and also instances where the insane-appearing movements led to mistakes as to the mental state, and in one instance the committal of a sane woman with chorea to the asylum. Pepper[1] refers to Professor Lordat, who prepared and thought up his lectures while aphasic, and Magnan[2] describes an instance of a will being correctly drawn up by a word-blind person who was unable to read it understandingly. Alex. Robertson[3] claims that the motor aphasic, retaining reasoning power almost entirely, is an accountable agent, whereas the sensory aphasic, if the disorder be complete and involves both auditory and visual cortical areas, cannot reason and is therefore irresponsible. It is very different with the minor defects, word deafness and word blindness. The uncertainty respecting the mental condition in slight forms of the disorder is greater in recent cases than in those of long standing, unless advance in the disorder has been made, as sometimes happens. A patient may appear to understand when he does not; some idea can be formed from his conduct, but careful tests are often necessary to reach an estimate.

[1] System of Practical Medicine, V. 956.
[2] Ibid. 957.
[3] Tuke, op. cit. 983.

Delusions and strange beliefs. Whenever the testator's mind is so deranged that he makes his will under the influence of an insane delusion the will is void. But the existence of delusions, however, is not necessarily incompatible with intellect sufficient to make a will.[1]

In an *obiter dictum* Lord Brougham[2] criticised the popular definition of monomania, declaring that the mind, being one and indivisible, if unsound upon a single subject, could not be sound upon other subjects, and impliedly held that a person partially insane was incompetent to make a will. The far-reaching and perplexing effects of such words can be imagined. While essentially right, the confusion of unsoundness of mind with testamentary capacity, two separate and distinct considerations, explains the situation.

Hallucinations have frequently been experienced by sane persons. After puerperal convulsions, for many months there may be slight hallucinations, and some of the apparitions may be distressing, such as threatening gesticulations, or appearances of persons long since dead or known to be at great distances away. Dr. Sam Johnson, the famous lexicographer, and Lord Castlereigh, are mentioned as having entertained hallucinations, while they were not regarded as insane; and the instance of the "hallucination" in the experience of Abraham Lincoln, who saw a faint double reflection of himself in a mirror, may be explained as an optical illusion due to imperfect glass or to reflections from both surfaces of the glass. But hallucinations, as well as delusions or illusions, are compatible with mental soundness or sanity.

Prejudices against relatives. Unreasonable prejudice against relatives is not ordinarily a ground for invalidating a will.[3] Omissions of a relative's name from a will may be due to memory failure, and give the appearance of deliberate disinheritance, which was not intended. The perverted affections of some puerperal women and hysterical women, and similar aversions that occur in melancholia, circular, gouty, rheumatic, and phthisical insanity, could readily suggest very unreasonable testamentary

[1] Rice v. Rice, 53 Mich. 432.
[2] Waring v. Waring (1848) 6 Moore, P. C. 341.
[3] Hall v. Hall, 38 Ala. 131.

dispositions. Cerebral neurasthenics, even during their worst accesses of fear or impulse, would not be likely to be affected, at any time, so far as a disposing mind was concerned; and after recovery from simple mania or melancholia there need be little apprehension of a mental warp in any way when convalescence is fully established. At first some excitability and memory defects may be noted, but ordinarily these disappear in a short time. Of course the periodical cases are liable at any time to go astray mentally; and it is the vesanic cases of melancholia and mania, transitory frenzy, and delirium, in which there are permanent recoveries.

Paretic dements may, in accordance with their grandiloquent insane ideas, make absurd wills. There should not be much difficulty in discerning the insanity in whatever a paretic dement may write. Violent, unreasonable antipathies against certain offspring or other individuals may be the main and only discovered symptom of insanity.

The handwriting and letters may determine mental states. Instances have been recorded where the insanity was revealed only in the letters, or the letters may appear sane and the writer be undoubtedly insane. Letters of the insane may contain absurd accusations or extravagances. Free use of exclamation points and underscoring, repetitions, omissions, incoherence, blots, illegibility, and the other contents generally, of letters of the insane, are often valuable aids to understanding the extent and nature of their maladies. Signatures, computations, accounts, or the failure to keep records previously maintained, may have their weight, along with conduct in general.

The effect of certain pursuits, intellectual or routine non-intellectual occupations, as tending to preservation or decay of the mind, is occasionally discussed during will contests. For instance, an aged person who has been devoted to business matters all his life, and who has few mental resources aside from such activities, is compelled by bodily infirmities to relinquish his accustomed habits of thought and work, whereupon he appears in a new light; and the enforced abandonment of all that engaged his attention and interested him may make it possible to construe his condition as a mental impairment, when he may be in possession of all the mentality he ever had. On the other

hand, an educated person finds some compensation for his afflictions in books, writing, or conversation, and will, under similar circumstances, appear to better advantage. When a person is taken out of his usual environment, through sickness or otherwise, mental distress is almost inevitable; and deterioration of the mind is likely to follow upon deprivation of accustomed exercise of mind or body. Retired merchants or sailors are affected by leisure far differently from scholars and professional persons.

Undue influence may be exerted in securing gifts or in procuring testamentary dispositions, the first by some personal advantage obtained by a donee placed in some close and confidential relation to the donor.[1] A spiritual medium induced a widow to adopt him and his son, and transfer £60,000 to him, and make a will in his favor, by representing that the deceased husband had communicated such a desire to the widow through the medium. The gifts were declared to be fraudulent and void.[2] Groundless suspicions of improper influence may arise through interest and jealousy.

"In order to set aside the will, deed, or contract of a person by reason of undue influence we must have," according to Amos G. Hull, of the New York Bar,[3] "(1) a subject whose mind is impaired by disease or infirmity; (2) there must be fraudulent persuasion or irresistible importunity; (3) the subject must be fraudulently induced to do that which he would not do if left free and in his normal condition; (4) when these concur we have undue influence; but when a man in the free and healthy possession of his powers is induced by trick, deceit, cunning, or circumvention, to execute a deed or a will, or make a contract unjust to himself or others, such cases are denominated actual frauds, and redress should be given in the courts under that characterization."

A "due" influence exerted in the instance of an insane person may be falsely interpreted, or an undue influence may be set up as a proper one. Imbeciles are particularly liable to be unduly influenced in any and all matters; therefore the slightest appear-

[1] Allcard v. Skinner (1887), L. R. 36 Ch. Div. 181.
[2] Lyon v. Home (1868), L. R. 6 Eq. 655, 682.
[3] Alienist and Neurologist, January, 1888, p. 94.

ance of interference or improper influence should be closely scrutinized; and the weight of evidence required to substantiate its existence should be in proportion to the liability of the party to have been affected by it.[1] Evidences of fraud would be most likely to appear if improper diversion of property had been made in the will of an imbecile.

During paranoia someone may take advantage of the delusions of persecution to the detriment of the lunatic or those dependent on him. The general suspiciousness of the paranoiac, however, might render this less likely. But such delusional insane persons are dangerous to swindlers, as they are apt to avenge themselves if they ascertain the fraud.

Climacterics, through spiritualistic and other religious zeal, may be improperly influenced in the disposition of property. Senile dements are particularly liable to fall into the clutches of designing persons who prey upon and instigate prejudices. Maniacs or paretic dements may be imposed upon through their generosity; melancholiacs are more apt to give away property outright than to write wills; but either may be done for the purpose of getting rid of means to which, in their feelings of unworthiness, they regard themselves as not entitled.

Terminal dements are as likely as imbeciles to make unwise transfers of property; the Hull House case of a dement who transferred a house and lot for a steerage passage ticket to Ireland is an instance.

Undue influence, or what could be better described by some other name, was exerted in the case of a dying senile dement who was induced to disinherit his daughter by the revengeful rejected suitor of that daughter. A complicated example of senile manipulation was that of a nephew who agreed to provide for an aged dement if all the property was transferred. Upon the deed being made the old man was forthwith set into the street. Some friends contested the deed, but the nephew actually bought up the witnesses who testified for the old man, and eventually induced the dement to testify against his own interests.

An insane asylum under religious management had charge of a hebephrenia case, a young man whose father left the patient a million dollars. Soon after the father's death the patient fell

[1] Ray, op. cit. p. 144, § 124.

sick, and the family attorney remembered that the insane person had been induced to exercise his ability to copy documents and to sign his name. A guardian was promptly appointed by the court, and the patient speedily recovered his usual physical health. The attorney feared that a fraudulent will would appear setting forth the restoration to reason of the hopelessly insane person as having occurred just before death. It is in matters concerning the management of the estates of the insane, rather than the rare cases of the sane being held in durance as insane, that vigilance should be exercised.

CHAPTER IX.

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I. GENERAL CONSIDERATIONS.

§ 1. *Rules applicable to civil cases.*

The rule with relation to insanity that one is not responsible for his acts when they are caused by mental disease or unsoundness of mind which dethrones the reason and judgment with respect to the act in question and destroys the power rationally to comprehend its nature and consequences, and which overpowers his will and irresistibly forces him to its commission, but that he is responsible where he possesses a rational intellect and sound mind, and allows his passions to escape control, though passion may for the time being have driven reason from her seat and usurped it and urged him with a force for the time irresistible, applies to

civil as well as criminal cases.[1] But the ancient rule that the law avoids every act done during a period of lunacy in civil suits, even though the act cannot be connected with the influence of insanity,[2] has been superseded by the more modern one that the law applies different rules or tests under different circumstances in considering questions involving insanity, and tries to ascertain whether the person alleged to be insane is such in respect to the particular question under investigation.[3] And in reaching a conclusion as to the validity of an act impeached upon the ground of mental incapacity, the degree of capacity essential to its proper execution is to be considered.[4] The degree of deprivation of mind which would be sufficient to avoid an act done, or continue a right, on the ground of insanity, need not be total, but must have some relation to the act done or the matter to be understood.[5] And mere proof of general derangement will not support a decree invalidating an act where there is an averment in the answer responsive to the bill, that the party was insane at the time of its performance.[6] So, the rules for judging as to the existence of insanity are the same in equity as in law.[7] Where there is legal capacity there cannot be equitable incapacity apart from fraud.[8] The jury in a civil action should not be told that the plea of insanity has led to abuse in the administration of justice, and must be examined with care, where the party alleged to be insane is not interested in the result of the litigation.[9]

§ 2. *Lucid intervals.*

Acts performed by a lunatic during a lucid interval are binding upon him.[10] And a lucid interval exists when the mind is appar-

[1] Ockendon v. Barnes, 43 Iowa, 615.

[2] Evans v. Thomas, 2 Hagg. Eccl. Rep. 433; McDonald v. McDonald, 14 Grant, Ch. 546.

[3] St. George v. Biddeford, 76 Me. 593.

[4] Parker v. Marco, 76 Fed. Rep. 510.

[5] Burnham v. Mitchell, 34 Wis. 117.

[6] Achey v. Stephens, 8 Ind. 411.

[7] Bennett v. Vade, 2 Atk. 324; Edwards v. Davenport, 4 McCrary, 24, 20 Fed. Rep. 756.

[8] Rippy v. Gant, 4 Ired. Eq. 443.

[9] Marceau v. Travelers' Ins. Co. 101 Cal. 338.

[10] Beverley's Case, 4 Coke, 125 a; Wheeler v. Alderson, 3 Hagg. Eccl. Rep. 574; Duffield v. Robeson, 2 Hare (Del.) 375; Aurentz v. Anderson,

ently rational on all subjects, and no symptoms of delusion can be called forth.[1] By a lucid interval is not meant a clearer moment, or an abatement of the violence, or relief from excessive pressure of the mind, but an interval in which the mind has thrown off the disease and recovered its general habits;[2] soundness of mind at the time, there having been preceding and succeeding unsoundness of mind.[3] It must be a restoration of the faculties, and not a mere cessation of the violent symptoms, and must be established by as strong evidence as is required to establish insanity,[4] though it need not be a perfect restoration of reason; it is sufficient if it is a restoration so far as to enable the party to comprehend and do the act in question with reason, memory, and judgment.[5] The judge would not be justified in finding a lucid interval where the party labored under a delusion which might be brought forth at any moment if the subject of it were alluded to, though in other respects he was perfectly rational.[6]

II. Contracts.

§ 1. *What mental incapacity affects.*

The rule is generally stated that idiots, lunatics, and persons *non compos mentis* are incapacitated to contract; but the mental incapacity which will justify setting aside a contract must be such as renders the party incapable of understanding and protecting his interests.[7] And while it was once held that there was no distinction between the capacity required to make different

3 Pittsb. 310; Cartwright v. Cartwright, 1 Phillm. Eccl. Rep. 90; Norman v. Georgia Loan & T. Co. 92 Ga. 295; Kingsbury v. Whitaker, 32 La. Ann. 1055, 36 Am. Rep. 278; Aubert v. Aubert, 6 La. Ann. 104; Tozer v. Saturlee, 3 Grant, Cas. 162; Wright v. Lewis, 5 Rich. L. 212, 55 Am. Dec. 714.

[1] Wheeler v. Alderson, 3 Hagg. Eccl. Rep. 574.

[2] Atty. Gen. v. Parnther, 3 Bro. Ch. 441.

[3] Bannatyne v. Bannatyne, 14 Eng. L. & Eq. 581, 16 Jur. 864.

[4] Ricketts v. Jolliff, 62 Miss. 440; Ekin v. McCracken, 11 Phila. 534; Aubert v. Aubert, 6 La. Ann. 104.

[5] Frazer v. Frazer, 2 Dell. Ch. 260; Ricketts v. Jolliff, 62 Miss. 440; Ekin v. McCracken, 11 Phila. 534; Creagh v. Blood, 8 Ir. Eq. 435. And see Sombre v. Solarolii, 1 Deane & S. 110.

[6] Creagh v. Blood, 8 Ir. Eq. 435.

For Dr. Clevenger's discussion on this subject, see ***Lucid Intervals***, Chap. VIII.

[7] Perry v. Pearson, 135 Ill. 218.

kinds of contracts, and that legal capacity to make a contract was capacity to make all contracts,[1] the rule would now seem to be settled that a person may be of unsound mind and incapable of transacting business of magnitude or of some degree of intricacy, and yet capable of binding himself with reference to simple matters,[2] a higher degree of mental capacity being required for an exchange of lands, or to make a complicated contract, than for the making of a valid will.[3] And a complaint to annul a contract upon the ground of unsoundness of mind and mental incapacity to transact business is insufficient where it does not allege the kind of business the party was unable to transact.[4] So, where incapacity to contract from defect of mind is alleged, the question is not whether the person's mind is impaired, or whether he is afflicted with any form of insanity, but whether the powers of his mind have been so far affected as to render him incapable of transacting business like that in question.[5] That a person's intellectual capacity is below the average of mankind does not alone furnish sufficient ground for setting aside his contracts;[6] and mere mental weakness resulting from age, sickness, or otherwise, not amounting to inability to comprehend the contract in question, furnishes no ground for equitable interference in the absence of imposition or undue influence.[7] Nor will a contract be

[1] Hale v. Brown, 11 Ala. 87.

[2] Seerley v. Sater, 68 Iowa, 376.

[3] Turner v. Houpt, 53 N. J. L. 526; Southern Tier Masonic Relief Asso. v. Laudenbach, 5 N. Y. Supp. 501.

[4] Fulwider v. Ingels, 87 Ind. 414.

[5] Dennett v. Dennett, 44 N. H. 531, 84 Am. Dec. 97.

[6] Mann v. Betterly, 21 Vt. 326.

[7] Juzan v. Toulmin, 9 Ala. 662, 44 Am. Dec. 448; Hemingway v. Coleman, 49 Conn. 390, 44 Am. Rep. 243; Jones v. Thompson, 5 Del. Ch. 374; Maddox v. Simmons, 31 Ga. 512; Pickerell v. Morss, 97 Ill. 220; Miller v. Craig, 36 Ill. 109; Graham v. Castor, 55 Ind. 559; Harris v. Wamsley, 41 Iowa, 671; DesMoines Nat. Bank v. Chisholm, 71 Iowa, 675; Wilson v. Oldham, 12 B. Mon. 55; Davis v. Phillips, 85 Mich. 198; Trimbo v. Trimbo, 47 Minn. 389; Simonton v. Bacon, 49 Miss. 582; Keithley v. Keithley, 85 Mo. 217; Hall v. Knappenberger (Mo.) 12 West. 410; Dennett v. Dennett, 44 N. H. 531, 84 Am. Dec. 97; Rippy v. Gant, 4 Ired. Eq. 443; Aiman v. Stout, 42 Pa. 114; Graham v. Pancoast, 30 Pa. 89; Nace v. Boyer, 30 Pa. 99; Dodds v. Wilson, 3 Brev. 389; Dodds v. Wilson, 1 Tread. 448; Kilgore v. Cross, 1 Fed. Rep. 578; Barker v. Northern P. R. Co. 65 Fed. Rep. 460; Gartside v. Isherwood, 1 Bro. C. C. 560.

set aside on account of the imbecility of a party thereto where there is not an essential privation of the reasoning faculties or an incapacity to understand and act with discretion in the ordinary affairs of life.[1] And the fact that the mind of a party to a contract had become impaired is no defense to the other party thereto as against the contract, where he was fully competent to make contracts and attend to his own business.[2] But weakness of mind of the party should be taken into consideration as a circumstance in determining whether the party should be released from the performance of a contract, or whether or not it should be enforced.[3] And relief does not depend upon the question whether the precise degree of imbecility charged is proved; imbecility may be proved and acted upon by the court though it is not of the degree charged.[4] The provisions of the Indiana statute that every contract, sale, or conveyance of any person while of unsound mind shall be void, is applicable only to persons who had been found *non compos mentis* in the manner prescribed by law.[5]

§ 2. *Tests.*

The test of capacity to make a contract where no fraud appears is whether the person whose act is challenged possesses sufficient mind to reasonably understand the nature and effect of the act he is doing or the business he is transacting;[6] whether he was capable of transacting ordinary business, and of acting rationally in the ordinary affairs of life;[7] whether he has reason, memory,

[1] Somers v. Pumphrey, 24 Ind. 231; Farnam v. Brooks, 9 Pick. 212; Cain v. Warford, 33 Md. 23; Shoulters v. Allen, 51 Mich. 529; Johnson v. Phifer, 8 Neb. 401; Mulloy v. Ingalls, 4 Neb. 115; Missouri P. R. Co. v. Brazzill, 72 Tex. 233.

[2] Harmon v. Harmon, 51 Fed. Rep. 113.

[3] Beller v. Jones, 22 Ark. 92.

[4] Doughty v. Doughty, 7 N. J. Eq. 227.

[5] Wilder v. Weakley, 34 Ind. 181; Freed v. Brown, 55 Ind. 310.

[6] Baldwin v. Dunton, 40 Ill. 189; Perry v. Pearson, 135 Ill. 218; Sands v. Potter, 59 Ill. App. 206; Hovey v. Chase, 52 Me. 304, 83 Am. Dec. 514; Bond v. Bond, 7 Allen, 13; Davis v. Phillips, 85 Mich. 198; Trimbo v. Trimbo, 47 Minn. 389; Dennett v. Dennett, 44 N. H. 531, 84 Am. Dec. 97; Hill v. Day, 34 N. J. Eq. 150; Lozear v. Shields, 23 N. J. Eq. 509; Edwards v. Davenport, 20 Fed. Rep. 756.

[7] Perry v. Pearson, 135 Ill. 218; Somers v. Pumphrey, 24 Ind. 231; Moffit v. Witherspoon, 10 Ired. L. 185.

and will enough to do the act in question freely and intelligently[1] and with a full knowledge of his rights and of the consequences of the act.[2] And a person who is capable of reasoning correctly concerning the ordinary affairs of life, and of contemplating and understanding the consequences which usually accompany ordinary acts, and of transacting business like that in question, will be held *compos mentis* and bound by his contracts,[3] while a contract may be avoided when made by a person whose mind was so impaired as to destroy his capacity to understand the nature and effect of the transaction,[4] or where he was mentally incapable of managing his own affairs or property.[5] A party is not bound by a contract entered into when his mental condition was such as to preclude any fair and reasonable exercise of his reasoning faculties, though there was not a total eclipse of his mind.[6] Thus, a contract of sale in which one of the parties is without capacity to comprehend fully the value of the property sold and the nature and terms of the contract, though in legal form, is voidable.[7] And the test of capacity in an action upon a contract for a sale of goods by a person alleged to be a lunatic, which was invalid for noncompliance with the statute of frauds, in which a subsequent delivery is relied upon to validate it, is whether the seller was competent to make the bargain, and if so whether his competency continued so as to enable him to complete and perfect it by delivery.[8] So, an assignment of an expectancy will be set aside where the mind of the assignor was so impaired by age that though she understood its effect she did not understand its nature, and was not able to distinguish her own debts from those of oth-

[1] Hiett v. Shull, 36 W. Va. 561; Kelly v. McGuire, 15 Ark. 555; Taylor v. Patrick, 1 Bibb, 168.

[2] Kelly v. McGuire, 15 Ark. 555.

[3] Baldwin v. Dunton, 40 Ill. 181; Behrens v. McKenzie, 23 Iowa, 333, 92 Am. Dec. 428; Young v. Stevens, 48 N. H. 133, 2 Am. Rep. 202, 97 Am. Dec. 592.

[4] Raynett v. Baluss, 54 Mich. 469; Nichols & S. Co. v. Hardman, 62 Mo. App. 153; Hiett v. Shull, 36 W. Va. 561.

[5] Prather v. Naylor, 1 B. Mon. 244; Young v. Stevens, 48 N. H. 133, 2 Am. Rep. 202, 97 Am. Dec. 597.

[6] Kilgore v. Cross, 1 Fed. Rep. 578.

[7] Hill v. McLaurin, 28 Miss. 288.

[8] Matthiessen v. McMahon, 38 N. J. L. 536.

ers, or to understand whether or not she was equitably required to pay them;[1] and an instruction in a contract action, that one who has enough mind and reason to clearly and fully understand the nature and consequences of his act is to be considered sane, is not objectionable because of the omission to state that one who lacks that capacity is to be considered insane, as that would be understood.[2] But an instruction that one is disqualified to contract when from old age, infirmity, or other misfortune he is reduced to a state of mental imbecility which disqualifies him from the proper exercise of his reasoning faculties and the ordinary prudential management of his affairs is too indefinite and uncertain.[3] Where a contract is sought to be avoided because of insanity of a party, the inquiry is whether or not he was sane at the time it was made.[4] And the question whether a party was of unsound mind and incapable of understanding and deciding upon the terms of a contract should be submitted to the jury in general terms.[5] Delusion, consisting of belief in things as real which do not in fact exist, or which a rational person would not believe, is not necessarily the true and legal test of insanity.[6]

§ 3. *Effect of partial insanity.*

A monomaniac is not a responsible agent where he parts with his property under the influence of his mania.[7] And a transfer by a father of his real estate to his children will be set aside where he labored under the delusion that he could control the elements, asserting power in himself to recall from death, and constantly exhibited indications of mental infirmity.[8] But the fact of insanity cannot be set up to avoid a business transaction where it was of such a character as not to affect capacity to trans-

[1] King v. Davis, 60 Vt. 502.

[2] Norman v. Georgia Loan & T. Co. 92 Ga. 295.

[3] Prather v. Noyes, 1 B. Mon. 244.

[4] Emery v. Hoyt, 46 Ill. 258; Fay v. Burditt, 81 Ind. 433, 42 Am. Rep. 142.

[5] Wright v. Wright, 139 Mass. 177.

[6] Wright v. Wright, 139 Mass. 177.

For Dr. Clevenger's discussion on this subject, see *Senility, Senile Dementia, Imbecility, Idiocy, Recurrent Insanity.*

[7] Alston v. Boyd, 6 Humph. 504.

[8] Young v. Young, 10 Grant, Ch. 365.

act business.[1] And evidence of excitement of mind touching religion which tends toward monomania is not sufficient to justify setting aside a sale of property made by a person thus afflicted.[2] And belief upon the part of a man that his wife was bewitched[3] or that he himself was bewitched[4] does not render him incompetent to contract. Nor will the mere existence of a delusion in the mind of a person making a contract, though connected with the subject-matter, be alone sufficient to avoid it; it is a question for the jury whether the delusion in fact affected it.[5]

§ 4. *Mental incapacity combined with fraud.*

While mere weakness of mind is not of itself sufficient ground to set aside a contract it is a material ingredient of the question whether the contract was obtained by fraud, imposition, or undue influence,[6] and is an item in the proof of fraud,[7] and may become a controlling circumstance when connected with other facts, tending to establish fraud in giving character to the transaction.[8] Thus, a contract obtained by undue influence or advantage taken of incompetency, weakness of understanding, or clouded or feeble faculties, will be set aside,[9] and will not be decreed to be carried into execution.[10] Taking advantage of the mental imbecility of

[1] Searle v. Galbraith, 73 Ill. 269.

[2] Lozear v. Shields, 23 N. J. Eq. 509.

[3] Johnson v. Johnson, 10 Ind. 387.

[4] McDonald v. McDonald, 16 Grant, Ch. 37.

[5] Jenkins v. Morris, L. R. 14 Ch. Div. 674.

For Dr. Clevenger's discussion on this subject, see *Partial Insanity, Monomania, Paranoia, Spiritualism.*

[6] Juzan v. Toulmin, 9 Ala. 662, 44 Am. Dec. 448; Jones v. Thompson, 5 Del. Ch. 374; Dennett v. Dennett, 44 N. H. 531, 84 Am. Dec. 97; Nace v. Boyer, 30 Pa. 99; Tally v. Smith, 1 Coldw. 290; Ellis v. Mathews, 19 Tex. 390, 70 Am. Dec. 353.

[7] Jackson v. King, 4 Cow. 207, 15 Am. Dec. 354; Milner v. Turner, 4 T. B. Mon. 244; Galpin v. Wilson, 40 Iowa, 90.

[8] Darnell v. Rowland, 30 Ind. 342; Jones v. Thompson, 5 Del. Ch. 374.

[9] Wray v. Wray, 32 Ind. 126; Harris v. Wamsley, 41 Iowa, 671; Wilson v. Oldham, 12 B. Mon. 55; Farnam v. Brooks, 9 Pick. 212; Schoellhamer v. Rometsch, 26 Or. 394; Hunt v. Moore, 2 Pa. 105; Tally v. Smith, 1 Coldw. 290; Birdsong v. Birdsong, 2 Head, 289; Sentance v. Poole, 3 Car. & P. 1; Gartside v. Isherwood, 1 Bro. C. C. 590.

[10] Green v. Wood, 2 Vern. 636; Dunnage v. White, 1 Swanst. 137.

another to procure from him a bargain manifestly unequal is a fraud in equity where pretenses are used which are not intended to be carried out.[1] But to warrant the cancelation of a contract there must have been such a degree of mental weakness as to render the party unable to guard himself against imposition or to resist importunity or undue influence,[2] and his position and the nature of the transaction must have been such as to justify the conclusion that he had not exercised a deliberate judgment but had been imposed upon, circumvented, or overcome by cunning, artifice, or undue influence,[3] which would not have prevailed against him if he had had the free use and exercise of his deliberate judgment.[4] And the question with relation to a contract between a person of weak understanding and another standing in a confidential relation with him is not whether the bargain was bad and disadvantageous, but whether he was led into it by unfair means, and whether the other had obtained an improper advantage,[5] the age or capacity of a person and the nature of the benefit being of but little importance.[6] And the cause of mental weakness constituting an element in fraud is immaterial.[7] And an agreement showing upon its face that the parties did not understand their rights or the nature of the transaction will not be enforced against one who surrendered an unimpeachable title without consideration, where he was grossly ignorant and subject to habitual intoxication and liable to imposition, though there was no direct proof of fraud or undue influence and he had acquiesced in it for five years.[8] A mere suggestion of weakness,

[1] Keeble v. Cummins, 5 Hayw. 43.

[2] Kelly v. McGuire, 15 Ark. 555; Baldwin v. Dunton, 40 Ill. 189; Coleman v. Frazer, 3 Bush, 300; Rippy v. Gant, 4 Ired. Eq. 443; Tally v. Smith, 1 Coldw. 290; Johnson v. Chadwell, 8 Humph. 145.

[3] Kilgore v. Cross, 1 Fed. Rep. 578; Taylor v. Atwood, 47 Conn. 498; Somes v. Skinner, 16 Mass. 348; Connelly v. Fisher, 3 Tenn. Ch. 382; Tally v. Smith, 1 Coldw. 290.

[4] Wray v. Wray, 32 Ind. 126; Somes v. Skinner, 16 Mass. 348.

[5] Simonton v. Bacon, 49 Miss. 582; Storrs v. Scougale, 48 Mich. 387; Rhodes v. Bate, L. R. 1 Ch. 252.

[6] Rhodes v. Bate, L. R. 1 Ch. 252.

[7] Jones v. Thompson, 5 Del. Ch. 374. But see Tracey v. Sacket, 1 Ohio St. 54, 59 Am. Dec. 610.

[8] Dunnage v. White, 1 Swanst. 137.

nowever, will not alone avoid a contract; it must appear that the other party had used some undue or improper means to draw the weak-minded party into it.[1] And fraud will not be presumed from the mere making of a contract even by a man feeble in mind and body.[2] Nor does the old age of a party justify a presumption that he was imposed upon.[3] Nor will the fact that one of the parties was old and the grandfather and employer of the other impose upon the latter the burden of proving affirmatively that no deception was practised or undue influence used.[4] And fraud is not to be inferred from the mere fact that a person weak in mind and body indorses a note for accommodation.[5]

But mental imbecility, though not amounting to absolute disqualification upon the part of a party to a contract, subjects it to strict examination, and the utmost fairness will be insisted upon.[6] And circumstances indicating overinfluence and advantage improperly taken give rise to a presumption of fraud.[7] And an inference that a contract was obtained by fraud, circumvention, or undue influence arises when it was rash and improvident and made with a person of weak understanding,[8] or from a contract made with knowledge of the other's incapacity.[9] And where a transaction appears to be wholly against the interests of a person of weak mind, to the advantage of the other party, or wholly without consideration, the court will require clear proof of a comprehension of its true nature, character, and effect, though the weakness does not amount to a total incapacity.[10] So, a contract made by a person of weak mind standing in a confidential rela-

[1] Simonton v. Bacon, 49 Miss. 582. And see Orr v. Pennington (Va.) 24 S. E. 928.

[2] Wirebach v. First Nat. Bank, 97 Pa. 549, 39 Am. Rep. 821.

[3] Lewis v. Pead, 1 Ves. Jr. 19.

[4] Cowee v. Cornell, 75 N. Y. 91, 31 Am. Rep. 428.

[5] Wirebach v. First Nat. Bank, 97 Pa. 543, 39 Am. Rep. 821.

[6] Cruise v. Christopher, 5 Dana, 181; Chevalier v. Whatley, 12 La. Ann. 651; Mason v. Dunbar, 43 Mich. 410, 38 Am. Rep. 201; Martin v. Baker (Mo.) 36 S. W. 369.

[7] Chevalier v. Whatley, 12 La. Ann. 651.

[8] Juzan v. Toulmin, 9 Ala. 662, 44 Am. Dec. 448; Ellis v. Mathews, 19 Tex. 390, 70 Am. Dec. 353; Tally v. Smith, 1 Coldw. 290.

[9] Jones v. Perkins, 5 B. Mon. 222.

[10] Jones v. Thompson, 5 Del. Ch. 374; Morton v. Morton (N. J.) 7 Cent. 134.

tion with the other party will be presumed to be against justice.[1] And the burden rests with the latter to show that the transaction was fair, and that the other understood the nature of his act.[2] So, where great weakness of mind concurs with gross inadequacy of consideration or circumstances of suspicion the contract will be presumed to have been brought about by undue influence,[3] especially when accompanied by an abuse of confidence.[4] And such a transaction casts the burden of proof upon the party obtaining the contract to show that the bargain was entered into carefully, deliberately, and with knowledge of all the circumstances connected with it,[5] and will not be upheld when there is nothing to show that it was understood by or explained to him.[6]

III. Conveyances.

§ 1. *What insanity affects.*

The general rule universally laid down, that a deed or other conveyance of an insane person is void or voidable, does not refer to insanity in its technical meaning.[7] And a deed may be upheld in a proper case without reference to the abstract question whether the grantor was sane or insane.[8] The mere fact that the mind of the grantor was to some extent impaired is not sufficient

[1] Jacox v. Jacox, 40 Mich. 473, 29 Am. Rep. 547; Simonton v. Bacon, 49 Miss. 582; Haydock v. Haydock, 34 N. J. Eq. 570, 38 Am. Rep. 385; Martin v. Baker (Mo.) 36 S. W. 369.

[2] Jacox v. Jacox, 40 Mich. 473, 29 Am. Rep. 547; Haydock v. Haydock, 34 N. J. Eq. 570, 38 Am. Rep. 385; Morton v. Morton (N. J.) 7 Cent. 134; Selden v. Myers, 61 U. S. 20 How. 506, 15 L. ed. 976.

[3] Cruise v. Christopher, 5 Dana, 181; Jones v. Thompson, 5 Del. Ch. 374; Tracey v. Sacket, 1 Ohio St. 54, 59 Am. Dec. 610; Mann v. Betterly, 21 Vt. 326; Fishburne v. Ferguson, 84 Va. 87; Turner v. Utah Title Ins. & T. Co. 10 Utah, 61; Turner v. Union National Bank, 10 Utah, 77; Peacock v. Evans, 16 Ves. Jr. 512; Longmate v. Ledger, 2 Giff. 157; Davies v. Cooper, 5 Myl. & C. 276. And see Gates v. Cornett, 72 Mich. 435; Cockell v. Taylor, 15 Beav. 115.

[4] Maddox v. Simmons, 31 Ga. 512; Cadwallader v. West, 48 Mo. 483; Richards v. Pitts, 124 Mo. 602; Gartside v. Isherwood, 1 Bro. C. C. 560.

[5] Clark v. Malpas, 31 Beav. 80.

[6] Hadward v. Campbell, 166 Pa. 365.

For Dr. Clevenger's discussion on this subject, see *Undue Influence.*

[7] Boggess v. Boggess, 127 Mo. 305.

[8] Jones v. Jones, 43 N. Y. S. R. 434.

to invalidate his deed.[1] But to constitute such unsoundness of mind as will avoid a deed it is not necessary that the grantor should have been without a glimmer of reason or that the unsoundness should have amounted to idiocy in the strict legal sense.[2] And the same rule will apply to an alienation of land by one who was of sound memory before he became *non compos mentis* as applies to an alienation by an idiot.[3]

Mere imbecility or weakness of the mind of a grantor, however, will not avoid his deed.[4] The mere fact that the mental powers of the grantor had been somewhat impaired by age or disease is not sufficient to invalidate his deed where he retains full comprehension of the meaning, design, and effect of his acts.[5] Nor will mere physical weakness of the grantor, however great, affect the validity of his deed in the absence of proof of mental incapacity.[6] And an allegation that a grantor was of weak and feeble intellect, and incapable of taking care of himself, will not warrant an issue as to his capacity to make a deed,[7] though a less

[1] Guild v. Warne, 149 Ill. 105; Kimball v. Cuddy, 117 Ill. 213; Burnham v. Kidwell, 113 Ill. 425; English v. Porter, 109 Ill. 285; Wiley v. Ewalt, 66 Ill. 26; Lindsey v. Lindsey, 50 Ill. 79, 99 Am. Dec. 489; Stone v. Wilbern, 83 Ill. 105; Hovey v. Hobson, 55 Me. 256; Hovey v. Chase, 52 Me. 305, 83 Am. Dec. 514; Cutler v. Zollinger, 117 Mo. 92; Sprague v. Duel, 11 Paige, 480; Buckey v. Buckey, 38 W. Va. 168.

[2] Ball v. Mannin, 3 Bligh, N. S. 1, 1 Dow & C. 880.

[3] Beverley's Case, 4 Coke, 125a.

[4] Somers v. Pumphrey, 24 Ind. 231; Wiley v. Ewalt, 66 Ill. 26; Burt v. Quisenberry, 132 Ill. 385; Willemin v. Dunn, 93 Ill. 511; Miller v. Craig, 36 Ill. 109; Van Horn v. Keenan, 28 Ill. 445; Des Moines Nat. Bank v. Chisholme, 71 Iowa, 675; Corbit v. Smith, 7 Iowa, 60, 71 Am. Dec. 431; Marmon v. Marmon, 47 Iowa, 121; Darby v. Hayford, 56 Me. 246; Dewey v. Allgire, 37 Neb. 6; Hay v. Miller, 48 Neb. 156; Johnson v. Phifer, 6 Neb. 401; Mulloy v. Ingalls, 4 Neb. 115; Davren v. White, 42 N. J. Eq. 569; Odell v. Buck, 21 Wend. 142; Lawrence v. Willis, 75 N. C. 471; Smith v. Beatty, 2 Ired. Eq. 456, 40 Am. Dec. 435; Aiman v. Stout, 42 Pa. 114; Anthony v. Hutchins, 10 R. I. 165; Beville v. Jones, 74 Tex. 148; Miller v. Rutledge, 82 Va. 863.

[5] Guild v. Warne, 149 Ill. 105; Francis v. Wilkinson, 147 Ill. 370; Guild v. Hull, 127 Ill. 523; Kimball v. Cuddy, 117 Ill. 313; Wiley v. Ewalt, 66 Ill. 26; Lindsey v. Lindsey, 50 Ill. 79, 99 Am. Dec. 489; Physio-Medical College v. Wilkinson, 108 Ind. 314; Cutler v. Zollinger, 117 Mo. 92.

[6] Emes v. Emes, 11 Grant, Ch. 325; Peabody v. Kendall, 145 Ill. 519.

[7] Lawrence v. Willis, 75 N. C. 471.

degree of proof of mental incapacity and undue influence is required to set aside a deed of a feeble old man ninety years of age than in case of a younger person.[1]

§ 2. *Tests.*

It has been held that the law does not undertake to measure the different degrees of power of the human intellect or to distinguish between them when the power to think and reason exists, but that it draws a line between sanity and insanity, or, in other words, between the presence and absence of reason,[2] and that to render a deed invalid an entire loss of understanding must be shown,[3] and that imbecility not amounting to idiocy or a total want of understanding is not sufficient to avoid a deed where no fraud was used,[4] and that the test of mental capacity to make a deed is not whether the person had sufficient understanding to know what he was doing, but whether he had the right use of his reason.[5] But this rule has been superseded, and the rule has been stated generally to be that one who is capable of transacting ordinary business and of acting rationally in the ordinary affairs of life has sufficient mental capacity to dispose of property by deed.[6] And an essential privation of the reasoning faculties incapacitates the party from acting with discretion in such affairs.[7] Within this rule buying and selling property, settling accounts, collecting and paying out money, or borrowing or loaning money, constitutes the transaction of ordinary business the capacity to do which shows sufficient capacity to dispose of property by deed.[8] And the party may not have

[1] Smith v. Smith, 60 Wis. 329.

[2] Somers v. Pumphrey, 24 Ind. 231; Jackson v. King, 4 Cow. 207, 15 Am. Dec. 354.

[3] Jackson v. King, 4 Cow. 207, 15 Am. Dec. 354.

[4] Odell v. Buck, 21 Wend. 142.

[5] Hale v. Hills, 8 Conn. 39.

[6] Francis v. Wilkinson, 147 Ill. 370; Peabody v. Kendall, 145 Ill. 519: Schneider v. Manning, 121 Ill. 376; English v. Porter, 109 Ill. 285; Titcomb v. Vantyle, 84 Ill. 371; Stone v. Wilbern, 83 Ill. 105; Hovey v. Chase, 52 Me. 305, 83 Am. Dec. 514; Ball v. Mannin, 3 Bligh, N. S. 1, 1 Dow & C. 880.

[7] Raymond v. Wathen, 142 Ind. 367.

[8] Francis v. Wilkinson, 147 Ill. 370.

sufficient intelligence to carry on business in a proper and prudent manner.[1]

A large majority of the cases, however, refer the test to the particular act in question making the degree of capacity required to conform to the degree involved in its performance, and stating the test of capacity to be whether the grantor possessed sufficient ability to understand in a reasonable manner the nature and effect of his act or of the business he was transacting,[2] and the legal consequences likely to flow from it,[3] and the extent and value of his property and the nature and extent and the claims of the grantees and others,[4] and to know that he was thereby transferring title to the grantee,[5] and whether he was capable of understanding and protecting his own interests.[6] Within this rule more capacity is required to make a valid deed

[1] Hovey v. Chase, 52 Me. 305, 83 Am. Dec. 514.

[2] Doe, Guest, v. Beeson, 2 Houst. 246; Jones v. Thompson, 5 Del. Ch. 374; Frazer v. Frazer, 2 Del. Ch. 260; Dicken v. Johnson, 7 Ga. 484; Kimball v. Cuddy, 117 Ill. 213; Titcomb v. Vantyle, 84 Ill. 371; Burt v. Quisenberry, 132 Ill. 385; Guild v. Hull, 127 Ill. 523; Peabody v. Kendall, 145 Ill. 519; Wiley v. Ewalt, 66 Ill. 26; Carpenter v. Carpenter, 8 Bush, 283; Ricketts v. Jolliff, 62 Miss. 540; Hovey v. Hobson, 55 Me. 256; Darby v. Hayford, 56 Me. 246; Hovey v. Chase, 52 Me. 305, 83 Am. Dec. 514; Boggess v. Boggess, 127 Mo. 305; Pennington v. Stanton, 125 Mo. 658; Cutler v. Zollinger, 117 Mo. 92; Dennett v. Dennett, 44 N. H. 541, 84 Am. Dec. 97; Davren v. White, 42 N. J. Eq. 569; Earle v. Norfolk & N. B. Hosiery Co. 36 N. J. Eq. 188; Eaton v. Eaton, 37 N. J. L. 108, 18 Am. Rep. 716; Blakeley v. Blakeley, 33 N. J. Eq. 508; Aldrich v. Bailey, 132 N. Y. 85; Van Deusen v. Sweet, 51 N. Y. 378; Jones v. Jones, 43 N. Y. S. R. 434; Creagh v. Blood, 2 Jones & L. 509, 8 Ir. Eq. 434; Bowman v. Van Baum, 17 Phila. 633, 14 W. N. C. 185; Day v. Seely, 17 Vt. 542; Miller v. Rutledge, 82 Va. 863; Buckey v. Buckey, 38 W. Va. 168; Jarrett v. Jarrett, 11 W. Va. 584; Wright v. Jackson, 59 Wis. 569; Hall v. Unger, 2 Abb. (U. S.) 507; Davies v. Grindley, Shelford, Lunacy, 266. And see Kennedy v. Marrast, 46 Ala. 161.

[3] Doe, Guest, v. Beeson, 2 Houst. 246; Jones v. Thompson, 5 Del. Ch. 374; Bowman v. Van Baum, 17 Phila. 633, 14 W. N. C. 185.

[4] Boggess v. Boggess, 127 Mo. 305; Jones v. Jones, 43 N. Y. S. R. 434; Miller v. Rutledge, 82 Va. 863; Buckey v. Buckey, 38 W. Va. 168; Guild v. Hull, 127 Ill. 523.

[5] Hovey v. Hobson, 55 Me. 256.

[6] Kimball v. Cuddy, 118 Ill. 213; Lindsey v. Lindsey, 50 Ill. 79, 99 Am. Dec. 489; Wiley v. Ewalt, 66 Ill. 26.

than a valid will,[1] and a much less degree of capacity is required for the execution of a mortgage, which was proposed, discussed, and determined upon previously when the party was of unimpaired capacity, leaving nothing to be done but the affixing of the signature, than is required for the execution of a complicated contract.[2] And a deed executed upon terms originated by the grantor while he was unquestionably sane will not be set aside on the ground of mental unsoundness where he retained capacity to recollect and understand the terms of the contract before agreed upon,[3] though a new transaction then for the first time proposed would be set aside.[4] In order to set aside a deed on the ground of senile dementia such a degree of mental weakness must be shown as renders the grantor incapable of understanding and protecting his interests.[5] And one who retains a knowledge of his property and of the character of his acts may make a valid deed though he may not have capacity to transact all the ordinary business of life.[6] And it is not necessary that he should perfectly comprehend the results of the bargain he was making, or know and understand whether the deed given did or did not constitute a mortgage,[7] though it is not sufficient merely that he knew he was making a deed and intended to do it.[8] So, a degree of weakness of mind far below what would be necessary to justify a commission of lunacy if it had been taken advantage of to procure the execution of a deed will be sufficient ground for setting the deed aside.[9] And the jury may consider as a test of capacity whether the party was capable of understanding what he was doing in executing the instrument when its general purport was fully explained to him.[10] And the fact that a grantor was neither wholly incompetent nor fully competent to understand the nature of the transaction does not justify setting aside

[1] Jarrett v. Jarrett, 11 W. Va. 584.
[2] Parker v. Marco, 76 Fed. Rep. 510.
[3] Jones v. Evans, 7 Dana, 96.
[4] Parker v. Marco, 76 Fed. Rep. 510.
[5] Guild v. Warne, 149 Ill. 105.
[6] Buckey v. Buckey, 38 W. Va. 168.
[7] Darby v. Hayford, 56 Me. 246.
[8] Schuff v. Ransom, 79 Ind. 458.
[9] Blachford v. Christian, 1 Knapp, 73.
[10] Ball v. Mannin, 3 Bligh, N. S. 1, 1 Dow & C. 880.

a deed where, under impartial advice, she could have understood it and have effected her intentions.[1]

So, the question, where the validity of a mortgage is attacked on the ground of insanity, is whether the mortgagor understood what he was doing and what property was covered by the mortgage and for what consideration it was given.[2] And one who has sufficent mental capacity to comprehend the making and execution of the mortgage and its use is estopped to interpose the defense of usury against a person purchasing it upon the faith of his affidavit that the mortgage was a good and valid security.[3] But a satisfaction of a mortgage will be canceled and set aside in equity where the party giving it was mentally incapable of understanding the nature of the act or of appreciating its consequences.[4] So, the execution of the power of attorney to sell real estate is an act of a simple character not involving complicated details, requiring only sufficient mind and memory to understand the nature of the business engaged in and the character and location of the property and the object and effect of the act,[5] the capacity required being the same as that required for the valid execution of a will of real property.[6] It is immaterial, on the question of capacity to make a deed, whether the grantor had native business capacity to understand it, or whether he learned from competent sources what would be for his interest, or had obtained advice from others so that by their explanation he must have been made to understand.[7]

§ 3. *Time of application of tests.*

The very time of the execution of a deed is the point of time for inquiry as to grantor's capacity to make it.[8] And it is not

[1] Stewart v. Flint, 59 Vt. 144.
[2] Parker v. Marco, 76 Fed. Rep. 510.
[3] Hirsch v. Trainer, 3 Abb. N. C. 274.
[4] Henrizi v. Kehr, 90 Wis. 344.
[5] Hall v. Unger, 2 Abb. (U. S.) 507.
[6] Hall v. Unger, 2 Abb. (U. S.) 507.
[7] Doty v. Hubbard, 55 Vt. 278.

For Dr. Clevenger's discussion on this subject, see *Disposing Mind, Imbecility, Senility, Periodical Insanity, Lucid Interval.*

[8] Francis v. Wilkinson, 147 Ill. 370; Buckey v. Buckey, 38 W. Va. 168; Jarrett v. Jarrett, 11 W. Va. 584; Anderson v. Cranmer, 11 W. Va. 562.

invalidated by the fact that the grantor was insane generally if he were sane at the time of executing it.[1] And a ratification of a deed made while insane must have been the intelligent act of the grantor knowing that he was acting under the contract contained in the deed and understanding and availing himself of it.[2]

§ 4. *Effect of partial insanity.*

Mere proof of insanity on the part of a grantor is not sufficient to set aside his deed; it must be shown that the transaction was affected by it.[3] Monomania or partial insanity will not invalidate a deed unless it is related to or such as to affect the grantor's reason and judgment with reference to the transaction.[4] But partial insanity of such a character as to induce a conveyance of property will avoid a deed, even in the absence of fraud.[5] And a conveyance made by a man of weak intellect to a woman whom he regarded as a divine person, who could say or do or wish nothing that was wrong and whose influence over him was unbounded, for an inadequate consideration, will be set aside in equity.[6] So, a party seeking to avoid a contract by reason of an hallucination must show its existence at the time of making the contract, and that it was of a character affecting his capacity.[7] And a delusion entertained by a grantor or mortgagor will not affect a conveyance made by him where it is in no way connected with and in no way affects the transaction.[8] And a mortgage given by a person who comprehends what he is doing is valid though he was afflicted with a religious delusion and was a person of eccentric habits.[9] So, a deed given by a person who knew the nature of her act and the character of the property, and had definite wishes with refer-

[1] Towart v. Sellars, 5 Dow. P. C. 231.

[2] Bond v. Bond, 7 Allen, 1.

[3] Blakeley v. Blakeley, 33 N. J. Eq. 508.

[4] Burgess v. Pollock, 53 Iowa, 273, 36 Am. Rep. 218; Cutler v. Zollinger, 117 Mo. 92; Benoist v. Murrin, 58 Mo. 307; Ekin v. McCracken, 11 Phila. 534; Boyce v. Smith, 9 Gratt. 704.

[5] Hay v. Miller, 48 Neb. 156; Dewey v. Allgire, 37 Neb. 6; Jone's Appeal, 11 W. N. C. 258; Lemon v. Jenkins, 48 Ga. 313.

[6] Jone's Appeal, 11 W. N. C. 258.

[7] Cutler v. Zollinger, 117 Mo. 92.

[8] Jones v. Hughes, 15 Abb. N. C. 141; Campbell v. Hill, 23 U. C. C. P. 473.

[9] Campbell v. Hill, 23 U. C. C. P. 473.

ence thereto, and secured them by contract, will not be set aside on the ground of mental incapacity, though she believed that there were devils and spirits in her room and that they crawled over her and made her bed an abiding place.[1]

Suspicions entertained by a party, arising from observations made by him and founded upon facts from which he was satisfied to deduce them, though exaggerated and extremely absurd, are not insane delusions which would legally disqualify him from making a binding disposition of his property.[2] But a deed may be avoided when made by a person laboring under an insane delusion which was such that though he knew he was making a deed and what its effect would be he was rendered entirely indifferent to property, incapacitating him from a rational care of his own interests or those of others.[3] And a delusion on the part of a father as to the conduct of his son, which prompts him to deed his property to others after having promised to devise it to a son, is sufficient to invalidate the deed.[4] And the burden of proof rests with the party claiming under a deed of a grantor who had labored under permanent or habitual insane delusions with reference to the subject-matter of the transaction to prove that he was free from such delusions at the time the deed was given.[5]

§ 5. *Mental incapacity combined with fraud.*

With reference to conveyances as well as contracts, a very modified degree of mental incapacity is sufficient to invalidate them if the transaction is accompanied by fraud, imposition, or undue influence.[6] And a deed will be set aside because of a degree of weakness of mind on the part of the grantor far less than that which would be necessary to justify the issuing of a commission or a verdict of lunacy where such weakness has been taken advan-

[1] Cutler v. Zollinger, 117 Mo. 92.

[2] Jones v. Hughes, 15 Abb. N. C. 141.

[3] Bond v. Bond, 7 Allen, 1.

[4] Kastell v. Hillman, 53 N. J. Eq. 49.

[5] Jerry v. Townshend, 9 Md. 145.

For Dr. Clevenger's discussion on this subject, see, *Partial Insanity, Paranoia, Periodical Insanity.*

[6] Corbit v. Smith, 7 Iowa, 60, 72 Am. Dec. 431; Anthony v. Hutchins, 10 R. I. 165.

tage of to procure its execution.[1] A conveyance made by a grantor while so imbecile of mind and infirm of purpose as to render him an easy victim to imposition and fraud will be set aside in equity where such influence has been used successfully in procuring it, though he was not positively insane,[2] and old age combined with weakness and fraud may constitute good ground for setting aside a deed.[3] Where the grantor acts from weak-mindedness it is the duty of the court to examine into the equities and take such steps as may be necessary to protect his rights,[4] and all the circumstances will be taken into consideration in determining whether the consideration was inadequate or the contract unequal.[5]

Where a deed is sought to be invalidated because of fraudulent imposition or influence upon a weak mind, however, the grantor must have been so enfeebled or weakened as to render him incapable under the circumstances of resisting the influence and asserting his own independence of will.[6] And the fact that he was old and of infirm mind and likely to yield to importunity or to become the victim of imposition will not invalidate his conveyance unless it appears that such improper influences were actually and successfully exerted.[7] The burden of proof rests with the grantee of an ignorant or weak-minded grantor to show that the contents of the deed were made known to him.[8] And a conveyance by an aged person of weak mind, without consideration, of all his real estate, comprising the bulk of his property, to a son and daughter to the exclusion of the other three children,

[1] Blachford v. Christian, 1 Knapp, 73; Craddock v. Cabiness, 1 Swan, 474; Greer v. Greens, 9 Gratt. 330.

[2] Gass v. Mason, 4 Sneed, 497; Long v. Long, 9 Md. 348; Mott v. Mott, 49 N. J. Eq. 192; Morton v. Morton (N. J.) 7 Cent. 134; Sprague v. Duel, Clarke, Ch. 90; Allore v. Jewell, 94 U. S. 506, 24 L. ed. 260; Harding v. Handy, 24 U. S. 11 Wheat. 103, 6 L. ed. 429; Kempson v. Ashbee, L. R. 10 Ch. Cas. 15.

[3] Smith v. Beatty, 2 Ind. Eq. 456, 40 Am. Dec. 435.

[4] Watson v. Smith, 7 Or. 448; Mott v. Mott, 49 N. J. Eq. 192; Perkins v. Scott, 23 Iowa, 237.

[5] Sprague v. Duel, Clarke, Ch. 90.

[6] Doe, Guest, v. Beeson, 2 Houst. 246.

[7] Walton v. Northington, 5 Sneed, 282; Marmon v. Marmon, 47 Iowa, 121; Willemin v. Dunn, 93 Ill. 511; Beville v. Jones, 74 Tex. 148; Day v. Seeley, 17 Vt. 542.

[8] Hyer v. Little, 20 N. J. Eq. 443.

will be declared void where the design was not proved to have originated with him, and the nature and legal effect of the transaction had not been fully or sufficiently explained to him.[1] So, weakness of intellect on the part of a grantor in connection with the fact that the conveyance was made in favor of a person standing in an intimate or trust relation, and is prejudiced or unfair, or other suspicious circumstances going to show that the weakness had been taken advantage of, will warrant setting it aside.[2] And such a transaction casts the burden of proof upon the grantee of perfect fairness and of capacity on the part of the grantor.[3] And where his testimony is evasive, the burden is increased and it is no excuse that he was afraid of being entrapped by counsel.[4] And evidence that a deed had been read over to an illiterate grantor by an unprofessional witness, whose capacity to explain it was doubtful, is not sufficient to sustain the burden of proof.[5] The facts that a grantor was of feeble intellect and the relation of principal and general agent existed between him and his grantee, and that the price paid for the land was inadequate, are all circumstances calculated to impeach a deed as fraudulent.[6]

So, great weakness of mind not amounting to absolute disqualification, coupled with grossly inadequate consideration, may furnish a sufficient ground for the interference of equity,[7] though each case must stand upon its own facts,[8] and an impaired mind

[1] Jones v. Thompson, 5 Del. Ch. 374.

[2] Lawrence v. Willis, 75 N. C. 471; Thorn v. Thorn, 51 Mich. 167; Prewett v. Coopwood, 30 Miss. 369; Cadwallader v. West, 48 Mo. 483; Lyons v. Van Riper, 26 N. J. Eq. 337; Craddock v. Cabiness, 1 Swan, 474; Henderson v. McGregor, 30 Wis. 78; Harding v. Handy, 24 U. S. 11 Wheat. 103, 6 L. ed. 429; Norton v. Relly, 2 Eden, 286; McDiarmid v. McDiarmid, 3 Bligh, N. S. 374. And see Sands v. Sands, 112 Ill. 225; Moore v. Moore, 67 Mo. 192.

[3] Crawford v. Hoeft, 58 Mich. 1; Duncombe v. Richards, 46 Mich. 166; Wartemberg v. Spiegel, 31 Mich. 402; Smith v. Smith, 60 Wis. 329.

[4] Duncombe v. Richards, 46 Mich. 166.

[5] Price v. Price, 1 DeG. M. & G. 308.

[6] Brooke v. Berry, 2 Gill, 83; Berry v. Hall, 105 N. C. 155.

[7] Allore v. Jewell, 94 U. S. 506, 24 L. ed. 260; Conley v. Nailor, 118 U. S. 127, 30 L. ed. 112; Wilson v. Oldham, 12 B. Mon. 55; McFaddin v. Vincent, 21 Tex. 47; Bunch v. Hurst, 3 Desauss. Eq. 273, 5 Am. Dec. 551; Clarkson v. Hanway, 2 P. Wms. 203. And see Hale v. Brown, 11 Ala. 87; Perkins v. Scott, 23 Iowa, 237.

[8] Conley v. Nailor, 118 U. S. 127, 30 L. ed. 112.

with inadequacy of consideration and deception and threats is sufficient to warrant setting aside a deed as having been obtained by fraud and undue influence.[1] And an entire absence of any valuable consideration, connected with deceit and general dotage upon the part of the grantor, is also sufficient.[2] So, a conveyance for a grossly inadequate consideration, obtained by taking advantage of a delusion under which the grantor labored, will be set aside though the grantee was not responsible for the delusion.[3] And a conveyance by one whose mind was greatly enfeebled and who was unacquainted with business, of an estate with which he was entirely unacquainted, to one who knew its value and knew his ignorance and failed to inform him correctly, suppressing certain facts and exciting his fears lest he should lose the whole, will be set aside though there was no actual fraud except such as would be inferred from the facts.[4] A complaint in an action to set aside a deed alleging that the grantor was of extreme old age and physical infirmity, and was mentally weak and incapable of attending to business personally, and incompetent to comprehend his property and the nature of a business transaction, not alleging that he was insane or completely incompetent to understand the transaction in question, is based upon fraud and will not justify a finding of insanity.[5]

IV. Proof to establish insanity with relation to contracts and conveyances.

§ 1. *Measure and weight.*

Proof of insanity of a party to a contract or conveyance must preponderate to invalidate the instrument, or the legal presumption in favor of sanity will sustain it.[6] The evidence of insanity must outweigh that of sanity, and if there is only a balance of

[1] Kroenung v. Goahri, 112 Mo. 641; James v. Langdon, 7 B. Mon. 193; Churchill v. Scott, 65 Mich. 485.

[2] Owing's Case, 1 Bland, Ch. 370, 17 Am. Dec. 311.

[3] Parkhurst v. Hosford, 21 Fed. Rep. 829.

[4] Lavette v. Sage, 29 Conn. 577. And see Clarkson v. Hanway, 2 P. Wms. 203.

[5] Aldrich v. Bailey, 132 N. Y. 85.

For Dr. Clevenger's discussion on this subject, see *Undue Influence, Senility, Senile Dementia, Imbecility, Disposing Mind.*

[6] Lilly v. Waggoner, 27 Ill. 395; Myatt v. Walker, 44 Ill. 485.

evidence the validity of the instrument will be upheld,[1] though a fair preponderance is all that is required.[2] Evidence which merely raises a strong doubt of the sanity of a grantor at the time of making a conveyance is not sufficient to defeat it.[3] And to overcome a deed executed openly and acknowledged before a notary who had known the grantor for years and who explained its effect, upon the ground of mental incapacity, the evidence should be clear and unquestionable.[4] Evidence which will not warrant the execution of a commission of lunacy against a party is insufficient to establish a degree of insanity or imbecility which will destroy his capacity to contract,[5] even though his intellect is much impaired, where no unconscionable advantage was taken to obtain the conveyance.[6]

So, where evidence on the question of sanity or insanity is given on both sides and is evenly balanced, an admission on the part of the grantee, who was the grantor's general agent, that he was incapable of transacting business, corroborates the affirmative of the issue and warrants a finding of mental incapacity.[7] And the affirmative evidence of those best acquainted with the person alleged to be insane should outweigh testimony of persons having interviews with him near the time in question that they saw no indications of insanity.[8] So, mere proof of general derangement of a grantor is insufficient to sustain a decree setting aside a conveyance where there is an averment in the answer responsive to the bill that he was sane at the time it was made.[9] And the testimony of an expert in an action to set aside a deed for mental incapacity of the grantor, that he did not know whether he made a deed, a will, or a lease, and that in his opinion he was not compe-

[1] Wall v. Hill, 1 B. Mon. 290, 36 Am. Dec. 578; Myatt v. Walker, 44 Ill. 485.

[2] Missouri P. R. Co. v. Brazzil, 72 Tex. 233.

[3] Myatt v. Walker, 44 Ill. 485; Aurentz v. Anderson, 3 Pittsb. 310; Laing v. Bruce, 1 Dunlop, B. & M. 59.

[4] Elcessor v. Elcessor, 146 Pa. 359.

[5] Baumgarden v. Langles, 35 La. Ann. 441; Sprague v. Duel, 11 Paige, 480.

[6] Sprague v. Duel, 11 Paige, 480.

[7] Brooke v. Berry, 2 Gill, 83.

[8] Emery v. Hoyt, 46 Ill. 258.

[9] Achey v. Stephens, 8 Ind. 411.

tent to protect his own interests, is sufficient to uphold a decree setting aside the deed.[1] But a deed may be upheld where the subscribing witnesses detailed facts and circumstances evidencing mental capacity, and a preponderance of the evidence sustains the grantor's capacity, though one of the subscribing witnesses gave an opinion that he was not competent to contract.[2] And a person who has not been interdicted is not proved to be universally insane, so that it could not but be known to the party dealing with him, by the opinions of five witnesses that he was feeble in intellect, where seven witnesses testify that he was of average mind.[3] So, evidence of witnesses present at the execution of a deed is entitled to particular weight upon the question of competency,[4] and is of greater weight on the question of capacity to contract than the opinions of witnesses based upon facts which might or might not have resulted from unsoundness of mind.[5] And next to physicians and persons present at the time, the evidence of persons whose intimacy with the family has given them an opportunity of seeing the grantor and watching the operations of his mind is important upon the question of his capacity.[6] So, evidence of a notary who takes a grantor's acknowledgment to his deed, that he was competent to make it, is entitled to great weight.[7]

§ 2. *Sufficiency, how determined.*

The question whether there is any evidence of insanity of a party making a deed or contract in an action involving its validity is one for the court,[8] but where there is evidence upon the subject the question as to its sufficiency is for the jury,[9] and evidence on the question of the sanity or insanity of a party which would justify an inference of the disputed fact must go to the

[1] Sponable v. Hanson, 87 Mich. 204.
[2] Jones v. Evans, 7 Dana, 96.
[3] Martinez v. Moll, 46 Fed. Rep. 721.
[4] Jarrett v. Jarrett, 11 W. Va. 584.
[5] Beverley v. Walden, 20 Gratt. 147.
[6] Jarrett v. Jarrett, 11 W. Va. 584.
[7] Buckey v. Buckey, 38 W. Va. 168.
[8] Campbell v. Hill, 23 U. C. C. P. 473.
[9] Doe, Sutton, v. Reagan, 5 Blackf. 217, 33 Am. Dec. 466; Campbell v. Hill, 23 U. C. C. P. 473; Doe, Guest, v. Beeson, 2 Houst. 246.

jury without reference to the strength and persuasiveness of the opposing proof.[1] And a finding setting aside a conveyance on the ground of the insanity of the grantor will not be set aside on appeal where there was evidence that at the time of its delivery the grantor was incapacitated from taking rational care of his property by reason of a delusion.[2] The question of capacity in an action to set aside a conveyance by a grantor of weak mind, however, not depending upon his absolute insanity at the time, may be determined by the court without granting an issue.[3] And the verdict of a jury as to such capacity in an action to set aside a deed as having been obtained by undue influence exercised upon a weak mind is not conclusive, the court being competent to determine for itself the degree of weakness or imposition which would induce it to set the deed aside.[4] So, though a delusion exists, the question of capacity to contract is still one of fact.[5]

§ 3. *Previous and subsequent insanity.*

The competency of a person making a conveyance or contract is to be determined as to the time when it was made, but the condition of his mind both before and afterwards is proper to be considered in determining his mental condition at that time.[6] And where insanity is established both before and after the execution of a contract, existing so near that time as to leave but a few hours intervening, and the character of the mania is such as to have led to the act, a lucid interval which will sustain it will not be inferred from the fact that he seemed to transact business in an intelligent manner.[7] The difference of time between the execution of deeds and the time at which their validity is challenged

[1] First Nat. Bank v. Wirebach, 106 Pa. 37; Asbury v. Fair, 111 N. C. 251.

[2] Crowther v. Rowlandson, 27 Cal. 376.

[3] Harding v. Handy, 24 U. S. 11 Wheat. 103, 6 L. ed. 429.

[4] Harding v. Handy, 24 U. S. 11 Wheat. 103, 6 L. ed. 429.

[5] Cutler v. Zollinger, 117 Mo. 92; Jenkins v. Morris, L. R. 14 Ch. Div. 674.

[6] Jarrett v. Jarrett, 11 W. Va. 584; Anderson v. Cranmer, 11 W. Va. 562; Watson v. Anderson, 11 Ala. 43; Grant v. Thompson, 4 Conn. 203, 10 Am. Dec. 119; Hendrix v. Money, 1 Bush, 306; Jerry v. Townshend, 9 Md. 145; Peaslee v. Robbins, 3 Met. 164; Dickinson v. Barber, 9 Mass. 225, 6 Am. Dec. 58; M'Adam v. Walker, 1 Dow, P. C. 148. And see Peters v. Peters, 101 Mich. 291.

[7] Ellars v. Mossbarger, 9 Ill. App. 122.

is a material consideration.[1] And where there is a conflict of evidence as to the party's sanity the testimony of witnesses relating to the period of time nearest to the date of their execution is entitled to the most weight.[2]

But a conveyance made twenty years before should not be set aside on the mere suggestion that the party making it was *non compos mentis*,[3] or on general evidence of insanity not applying to the particular moment of execution, where there is general evidence of sanity during the same period, corroborated by the performance of sane acts and the fact that the deed itself was rational.[4] Nor will a mortgage be set aside upon general evidence of insane delusions and hallucinations springing mainly from religious excitement and absurd conduct and extravagant talk ranging over a number of years, where none of it approached the transaction in question, which was rational in its nature.[5] And evidence of monomania extending over twenty years anterior to and down to the year in which deeds were executed by a grantor, found some years afterwards by commission to have been insane all such time, is not sufficient to overcome a prima facie case of sanity at the time of their execution.[6] Nor will the restoration of a bond for a deed be directed on the ground that the maker thereof was insane because at or about that time he showed unmistakable indications of aberration of mind where he continued in business for several months after that time.[7] And an instruction in an action to set aside a deed that the appearance of the grantor might be taken into consideration in determining his sanity is not objectionable upon the ground that a verdict should not be permitted to be based upon his appearance, or that the time intervening was too long, where the evidence is not all in the record.[8] So, evidence that a person is sane or insane at the time of the trial may be given as tending

[1] Towart v. Sellars, 5 Dow, P. C. 231. And see Berry v. Hall, 105 N. C. 154.

[2] Exum v. Canty, 34 Miss. 533.

[3] Winchomb v. Hall, 1 Ch. Rep. 40. And see Harden v. Hays, 14 Pa. 91.

[4] Towart v. Sellars, 5 Dow, P. C. 231.

[5] Campbell v. Hill, 23 U. C. C. P. 526.

[6] Ferguson v. Borrett, 1 Fost. & F. 613.

[7] Hubbard v. Hoag, 60 Iowa, 756.

[8] Koile v. Ellis, 16 Ind. 301.

to show the condition of his mind at a previous period, the jury being left to judge as to its weight.[1]

§ 4. *Nature of the act.*

Where the evidence as to insanity in an action to set aside a deed is evenly balanced the court will look to the circumstances surrounding the transaction and its fairness and rationality, and the probability that one in possession of his faculties would or would not perform it,[2] such probability affording strong evidence of the presence or absence of insanity.[3] And evidence of prudence and judgment manifested in determining the best mode of carrying a conveyance into effect and effecting the intentions of the grantor gives rise to a presumption that he was not too mentally weak to execute the instrument.[4] So, the fact that a grantor realized for his land all that it was worth and accomplished his purpose, which was a reasonable one, affords strong proof of his capacity to make a deed.[5] And evidence that there was nothing unnatural or improvident in a transaction will sustain a deed as against proof of incompetency, coming largely from prejudiced witnesses who produced no testimony as to grantor's condition at the time of its execution.[6] Nor will a contract and conveyance disposing of an estate in a rational, just, and prudent manner be disturbed upon evidence of previous fits of nervous disturbance on the part of the grantor requiring some guardian care for himself and his business,[7] or by the fact that the grantor was confined in a lunatic asylum and was partially released from his fetters to enable him to execute the deed, where no coercion or stratagem or contrivance was employed to induce him to execute it, and there was no pretense of imposition.[8]

[1] Berry v. Hall, 105 N. C. 154.

For Dr. Clevenger's discussion on this subject, see *Lucid Interval, Monomania, Paranoia, Periodical Insanity.*

[2] Hemphill v. Holford, 88 Mich. 293; Pike v. Pike, 104 Ala. 642.

[3] Pike v. Pike, 104 Ala. 642.

[4] Clearwater v. Kimler, 43 Ill. 272.

[5] Ripley v. Babcock, 13 Wis. 425.

[6] Stewart v. Curtis, 85 Mich. 496.

[7] Speers v. Sewell, 4 Bush, 239.

[8] Selby v. Jackson, 6 Beav. 192.

A deed the execution of which is not consistent with the exercise of mental capacity, however,[1] or one made by a man of weak intellect in very necessitous circumstances, by which he transfers his rights for an inadequate price,[2] will be set aside in equity. And a deed of valuable property by a father to one of his sons, who habitually furnished him with drink, and a subsequent deed of the same property to the wife of such son, and a release of an action brought to set it aside, will be set aside where the father had become deranged and fatuous from habitual drunkenness.[3] But, however impossible and unaccountable a deed may be, it cannot be impeached where the grantor had sufficient understanding to clearly comprehend the nature of the business he was engaged in and freely consented thereto.[4] Mere weakness and folly displayed in the disposition of property are not sufficient to warrant setting it aside.[5] And a sale of valuable property to be paid for in confederate currency which was greatly depreciated does not of itself indicate mental incapacity which will affect the validity of the sale, where it does not appear that the property would have been productive in the future, or that the grantor could have realized more than the amount for which he sold it.[6] So, the performance of the act in question by a lunatic is not of itself sufficient evidence of a lucid interval,[7] and a conveyance which is not in accordance with the conduct of men of ordinary prudence tends to disprove the existence of a lucid interval.[8]

§ 5. *Previous intentions.*

A deed in execution of a purpose maintained by the grantor for many years will be upheld though he was old, illiterate, and of weak mind at the time.[9] But the declarations of a grantor

[1] McDaniel v. McCoy, 68 Mich. 340; Lemon v. Jenkins, 48 Ga. 313.
[2] Bunch v. Hurst, 3 Desauss. Eq. 273, 5 Am. Dec. 551.
[3] Nevills v. Nevills, 6 Grant, Ch. 636.
[4] Jarrett v. Jarrett, 11 W. Va. 584.
[5] Siemon v. Wilson, 3 Edw. Ch. 36.
[6] Beverley v. Walden, 20 Gratt. 147.
[7] Creagh v. Blood, 8 Ir. Eq. 435.
[8] Pike v. Pike, 104 Ala. 642.
For Dr. Clevenger's discussion on this subject, see *Lucid Interval*, chap. VIII. p. 230.
[9] James v. Langdon, 7 B. Mon. 193; Exum v. Canty, 34 Miss. 532.

while of sane mind as to his intentions concerning the disposal of certain property would not of themselves tend to prove that he was insane at the time of making a subsequent conveyance of such property making a different disposition of it.[1] And a deed procured by a husband from his wife at a time when there was strong evidence that she was in a delirious state of mind, and so near death as to have lost even the faintest glimmer of either observation or memory of earthly affairs, will be set aside though there was evidence that she intended to make that disposition of her property.[2]

§ 6. *Acts and conduct.*

Absurd or irrational conduct affords evidence of unsoundness of mind, and the greater the number of such acts the stronger the proof; but though they tend to prove insanity they may not be sufficient to establish the fact.[3] Thus, the fact that one who had previously been cheerful becomes moody and despondent and fears that he is coming to want, and believes that his wife has funds to aid him but declines to do so, justifies equitable investigation into the justice of any bargain made with persons in a confidential relation;[4] though the mere fact that a grantor had fallen into a melancholy frame of mind expressing apprehension of coming want and becoming less social than formerly would be insufficient to avoid his deed.[5] And evidence of a change of disposition upon the part of a party after the sudden death of his wife, and that he became sullen, ugly, and quarrelsome, and treated his mother unkindly, charging her with wanting to get his insurance, and believed that men were following him who were going to kill him, and that a man had chased him, and that he had trouble with a fellow laborer, and had fallen into the drinking habit and finally took his life, is not sufficient to require the submission to the jury of the question as to whether or not

[1] Howe v. Howe, 99 Mass. 88.

[2] Lenhard v. Lenhard, 59 Wis. 60.

[3] Ekin v. McCracken, 11 Phila. 534.

[4] Jacox v. Jacox, 40 Mich. 473, 29 Am. Rep. 547.

[5] Canfield v. Fairbanks, 63 Barb. 462.

For Dr. Clevenger's discussion on this subject, see *Senile Dementia, Melancholia, Delusions.*

he was mentally incapacitated to make an exchange of one benefit certificate for another.[1]

So, evidence of forgetfulness on the part of a grantor of persons and events, and that he frequently failed to recognize members of his own family, and of carelessness in business matters, and of forgetfulness of the nature and extent of his property, and that his business was transacted by his son, is sufficient to establish incapacity to make a deed.[2] And extravagant actions, and haggard appearance, and unnatural excitement, and periods of depression, exaltation, and wild, unreasonable, and visionary projects and delusions as to business enterprises, on the part of a grantor, are sufficient to establish insanity, though he had not the appearance of an insane man and his family had not seen fit to interfere with his affairs.[3] And incapacity to make a deed is established by proof that the grantor after meeting with important losses abandoned his business, secreted himself, and became noisy and obscene, shouting, singing, and praying, so that he could be heard a long distance, and became subject to fits, and acted in a wild and eccentric manner, and that he was controlled and managed by his son by the use of a whip, to which he submitted uncomplainingly.[4] Nor is proof that an old man about eighty years of age desired to marry a woman about half his age and of not very good character, wholly irrelevant in an action involving his capacity to contract.[5]

Belief in spiritualism, however, and in communications with deceased persons, does not necessarily establish such insanity as will invalidate a deed,[6] though a deed procured by a medium by the use of his power as such would be held invalid.[7] And foolish and absurd sayings on the part of a person who had once been insane will not alone establish insanity which will invalidate his deed, where his words did not necessarily show an insane de-

[1] Boorman v. Northwestern Mut. Relief Asso. 90 Wis. 145.

[2] Boggess v. Boggess, 127 Mo. 305.

[3] Curtis v. Brownell, 42 Mich. 165.

[4] Haviland v. Hayes, 37 N. Y. 25.

[5] Prather v. Naylor, 1 B. Mon. 244.

[6] Lewis v. Arbuckle, 85 Iowa, 335, 16 L. R. A. 677; Turner v. Hand, 3 Wall. Jr. 88.

[7] Lyon v. Hone, L. R. 6 Eq. 655. And see Leighton v. Orr, 44 Iowa, 691.

lusion.[1] And hostility to the physicians of an asylum on the part of an inmate does not establish an insane delusion which will affect the validity of his deed where it does not appear that his criticisms were unfounded in fact.[2] And the impossibility of perpetual motion is not so apparent to the uneducated mind that a belief in it is evidence of idiocy or imbecility, and such belief does not tend to disqualify one from disposing of property by deed.[3] Nor is testimony of an assignor that he did not recollect making an assignment sufficient to shift the burden of proof of mental incapacity at the time of making it from the party asserting it, where it appears that he had not been oblivious of the transaction at all times, and his failure of memory was traceable to subsequent causes.[4]

So, the fact that a grantor subsequently expressed satisfaction with what he had done, and took no steps to set aside his deed, is evidence tending to show that he knew what he was doing when he executed it.[5] And acts of ownership over property purchased by an attorney, and declarations of the principal that he had told the attorney to buy it, not only show ratification, but also clear away all pretense to want of intentional and intelligent execution of the power of attorney.[6] So, the fact that a grantor deeded his property to his son to prevent creditors from reaching it, securing to himself the right of possession and use during life, clearly indicates that he understood what he was doing.[7] And a woman who can read and write, and who is a member of a reputable church in good standing, and who conducted her father's household affairs and after her marriage those of her husband prudently and with ordinary skill, and instructed her husband's children in the ordinary domestic affairs, cannot be held to be incompetent to make a deed.[8]

[1] Ripley v. Babcock, 13 Wis. 425.
[2] Wright v. Jackson, 59 Wis. 569.
[3] Burt v. Quisenberry, 132 Ill. 385.
[4] Dorchester v. Dorchester, 18 N. Y. S. R. 402.
[5] Ralston v. Turpin, 129 U. S. 663, 32 L. ed. 747; Aiman v. Stout, 42 Pa. 114.
[6] Aiman v. Stout, 42 Pa. 114.
[7] Argo v. Coffin, 142 Ill. 368.
[8] Somers v. Pumphrey, 24 Ind. 231.

§ 7. *Conduct of others.*

The conduct of an interested party toward a person alleged to have been insane at the time of a contract or conveyance by him, treating him as sane and responsible, or as insane and irresponsible, is evidence for consideration on the question of capacity to do the act,[1] and is of much greater value as proof of their opinions as to his capacity than any terms they may employ as witnesses to express them.[2] Thus, evidence that a grantor was considered by his family and others as of unsound mind, and that the entire control and management of his property were taken away from him, together with evidence that he never voted or attended church or places of public worship, and of frequent violence and senseless conduct and language, is sufficient to establish his incompetency to make a deed.[3] So, on the other hand, where the confidential agent of a grantor and his attorney and business manager are present at the execution of his deed, aiding him with their counsel, it will not be presumed, in the absence of proof, that they would have permitted him to sign it if his freedom from improper influence or his mental condition was questionable.[4] And a lease made by an elderly man which was acquiesced in by his children who were familiar with all the circumstances will not be disturbed in the absence of satisfactory proof of weakness of intellect connected with inadequacy of consideration and fraud.[5] And a mortgage made by a locomotive engineer will not be set aside, though he had been insane and had been laid off on that account, but had become better and was again placed in charge of a locomotive at about the time the mortgage was executed, where he continued about six weeks, though he afterwards became entirely insane.[6]

§ 8. *Age; Weakness; Disease.*

Old age alone is not sufficient to establish incapacity to make a

[1] Laing v. Bruce, 1 Dunlop, B. & M. 59; Curtis v. Brownell, 42 Mich. 165.
[2] Jacox v. Jacox, 40 Mich. 473, 29 Am. Rep. 547.
[3] Hunt v. Hunt, 13 N. J. Eq. 161.
[4] Willemin v. Dunn, 93 Ill. 511.
[5] Waters v. Barral, 2 Bush, 598.
[6] Baldrick v. Garvey, 66 Iowa, 16.

deed or contract.[1] But advanced age of a grantor and great grief and sickness induced by the recent death of his wife are proper to be considered on the question of mental capacity to execute a deed.[2] And evidence that the maker of an assignment to pay debts was ninety years old, and that her faculties were much enfeebled and her memory seriously impaired, and that she could not understand whether she owed the debts or not, or whether in equity and justice she ought to pay them, is sufficient to warrant setting aside the assignment.[3] But a contract entered into by an old man somewhat feeble in body and mind will not be set aside for mental incapacity and undue influence where it was made at his own suggestion and he afterwards told relatives exactly what he had done and seemed to understand the terms and nature of the contract.[4] Proof that a grantor remembered events that occurred many years ago much more vividly than recent occurrences, however, and that he would sometimes forget himself in conversation and not be intelligible, tends to prove an impaired or weakened mind, but does not show want of sufficient mental capacity to dispose of property by deed;[5] though the fact that a grantor is much impaired in body and somewhat enfeebled in mind is proper to be taken into consideration with other circumstances upon the question of the existence of undue influence to make the deed.[6] But it does not necessarily imply an absence of capacity to make a deed.[7] And the opinion of a witness who had known another for several years, that his mind was rather weak at the time of making the contract in question but was improving, but that it was not sufficient to warrant the witness to contract with him, does not establish his insanity.[8]

So, proof of disease which tends to cause insanity or incapacity is evidence of incompetency to make a deed or contract, and evidence that a grantor had been subject to epileptic fits for a long period will

[1] Buckey v. Buckey, 38 W. Va. 168; Jarrett v. Jarrett, 11 W. Va. 584; Burt v. Quisenberry, 132 Ill. 385; Lewis v. Pead, 1 Ves. Jr. 19.

[2] Willemin v. Dunn, 93 Ill. 511.

[3] King v. Cummins, 60 Vt. 502.

[4] Robinson v. Allbee, 1 Ohio Dec. 19.

[5] Burt v. Quisenberry, 132 Ill. 385.

[6] Sears v. Shafer, 1 Barb. 408; Walton v. Northington, 5 Sneed, 282.

[7] Ralston v. Turpin, 129 U. S. 663, 32 L. ed. 747.

[8] Darnell v. Rowland, 30 Ind. 342.

warrant a decree setting aside his deed.[1] And a deed will be set aside upon the ground of undue influence and mental incapacity when made but a few hours before death by a person afflicted with pneumonia, from the regular course of which he must have been delirious or in a stupor at that time.[2] Where the mind of a party to a contract was previously sound, the state of his bodily health is to be looked to on the question of his competency, not as evidence of insanity, but to ascertain what effect it had on his mind.[3] But the fact that a grantor was in the earlier stages of a disease consisting of a continuous disorganization of the brain itself, but which was not uniform in its influence upon the understanding, will not invalidate his deed where he comprehended what he was doing and the consequences of his act at the time.[4] Nor will evidence of mere difficulty of speech upon the part of one who had had an attack of paralysis which was not severe, prove anything as to his capacity to execute a deed.[5] And a paralytic stroke will not invalidate a note and mortgage, though it affected the mortgagor's mind, where he had so far recovered as to assume control of his business and carry on important transactions.[6] Nor would such a transaction be affected by several attacks of paralysis from which the party had never recovered, but had been getting worse both in body and mind, where the consideration was adequate and he fully comprehended what he was doing and intended to do what he did.[7]

§ 9. *Adjudication of unsoundness.*

The question as to the effect of an adjudication of soundness or unsoundness of mind of a party upon an inquisition or a commission of lunacy, or on application for the appointment of a

[1] Potter v. Woodruff, 92 Mich. 8.

[2] Worthington v. Major, 94 Mich. 325.

[3] McAdam v. Walker, 1 Dow, P. C. 148. And see Fane v. Devonshire, 6 Bro. P. C. 137.

[4] Day v. Seeley, 17 Vt. 542.

[5] Doran v. McConlogue, 150 Pa. 98.

[6] Peake v. Van Lewven, 59 Iowa, 764.

[7] Hodgdon v. Crosby, 1 Wash. Terr. 578.

For Dr. Clevenger's discussion on this subject, see *Senility, Senile Dementia, Brain Degradation*, chap. XVII.

guardian will be elsewhere treated.[1] A decree of a surrogate in a will contest that the mind of a testator was unsound, and that he was mentally incompetent to make a will, is competent and prima facie, but not conclusive, evidence of his incapacity to make a deed at or about that time.[2] And where the will was executed later in the same day, the donee first claiming the property under the will, such a determination will warrant a decree that the deed was invalid.[3] But the commitment of a person to an insane hospital for treatment is not evidence of mental incapacity to make contracts,[4] though it has been held admissible as tending to prove the fact.[5] And deeds executed by a party in confinement in a lunatic asylum, whose hands were unfettered for the purpose, will not be set aside where he was a man of vigorous understanding, capable of understanding the operation of the instrument, and the restraint imposed upon him was at his own request, and he read them over before execution, suggesting alterations, and acquiesced in them several months after his discharge.[6] The preliminary action of the court in appointing a next friend of a party to conduct an action is not such a finding of insanity as will overcome the presumption of sanity and shift the burden of proof.[7]

V. Wills.

§ 1. *What insanity affects—generally.*

The highest degree of mental soundness is not required to constitute testamentary capacity.[8] A person of very mild capacity may make a valid will where he fully understands what he is doing.[9] Nor need a testator's mind be perfectly balanced and

See *Guardianship*, chap. IX.

[1] Baxter v. Baxter, 76 Hun, 98.

[2] Bishop v. Hendrick, 42 N. Y. S. R. 296.

[3] Schaps v. Lehner, 54 Minn. 208; Knox v. Haug, 48 Minn. 58; Dewey v. Allgire, 37 Neb. 6; Wagener v. Harriott, 20 Abb. N. C. 283. And see Leggate v. Clark, 111 Mass. 308.

[4] Wheeler v. State, 34 Ohio St. 394, 32 Am. Rep. 372. And see Kellogg v. Cochran, 87 Cal. 192, 12 L. R. A. 104.

[5] Selby v. Jackson, 13 L. J. Ch. N. S. 249.

[6] Smith v. Smith, 108 N. C. 365.

[7] Com. v. Hughes, 133 Mass. 496.

[8] Howell v. Taylor, 50 N. J. Eq. 428; Barnhardt v. Smith, 86 N. C. 473.

free from all prejudice and passion,[1] or be in the most perfect state of integrity and possess all its force and vigor.[2] Nor need the testator's mind be strong or entirely sound, where he understands the disposition he wished to make of his property.[3] Nor need he be able always to form a correct opinion without error.[4] But mental incapacity to invalidate a will need not be that total obliteration of the mental faculties which prevents a party from reasoning correctly on all subjects or at all times, or the want of power to arrive at a correct conclusion upon correct premises.[5] A testator cannot make a valid will where he has not sufficient capacity to know what he is doing or to understand that he is executing a will,[6] though the incapacity was produced by the use of medicines.[7] And an alteration in a will leaving a son totally unprovided for is invalid, though the testator knew that he was doing some testamentary act, but did not know the important alteration he was making.[8] So, a testamentary disposition by one who was in such a condition as to render him unable to signify his wishes is invalid.[9] And so when he has lost the power of combining and arranging his ideas.[10] And the attestation of a will at a time when the testator was in such a condition as to be unable to dissent from it if he desired invalidates it.[11] And a will designed by another and only assented to by the testator on being asked when he had no power to understand it will not be sus-

[1] Phillips v. Chater, 1 Dem. 533; Boughton v. Knight, 28 L. T. N. S. 566.

[2] Leech v. Leech, 5 Clark (Pa.) 86; Re Goodman's Trusts, 44 L. T. N. S. 527; Andress v. Weller, 3 N. J. Eq. 604; Cornwell v. Riker, 2 Dem. 354; Webber v. Sullivan, 58 Iowa, 260.

[3] Freeman v. Easly, 117 Ill. 317; Bundy v. McKnight, 48 Ind. 502; Zeltner v. Bodman German Protestant Widow's Home, 1 Ohio Dec. 306; Shaver v. McCarthy, 110 Pa. 339; Bulger v. Ross, 98 Ala. 267.

[4] Kramer v. Weinert, 81 Ala. 414.

[5] Meeker v. Meeker, 75 Ill. 260; McTaggart v. Thompson, 14 Pa. 149.

[6] Bittleston v. Clark, 2 Lee, Eccl. Rep. 229; Etter v. Armstrong, 46 Ind. 197.

[7] Stedham v. Stedham, 32 Ala. 525.

[8] Brouncker v. Brouncker, 2 Phillim. Eccl. Rep. 57. And see Young v. Ridenbaugh, 67 Mo. 574.

[9] Parish v. Parish, 42 Barb. 274; McSorley v. McSorley, 2 Bradf. 188.

[10] Abraham v. Wilkins, 17 Ark. 292.

[11] McMechen v. McMechen, 17 W. Va. 683, 41 Am. Rep. 682; Knapp v. Reilly, 3 Dem. 427.

tained.[1] The doctrine that an act performed by a lunatic during a lucid interval is binding, however, applies to wills, and a will made by an insane person during a lucid interval is valid,[2] though he was insane both before and after its execution,[3] or though he was subject to complete insanity.[4] General habitual insanity will not affect the validity of a will where there were intermissions and it was executed during one of them,[5] but the existence of such an interval at that particular time must be established.[6] The words "of unsound mind," as used in the Indiana statute of wills, mean such a degree of unsoundness of mind as incapacitates one from making a will according to the standard of testamentary capacity as fixed by the adjudicated cases,[7] including every species of mental unsoundness,[8] and the words "lunatic," or *non compos mentis*, in the Tennessee act of April 1, 1885, providing that all personal estate of which a lunatic or *non compos* dies seised intestate, derived from such person's husband or wife, should go to the next of kin of the person through whom it was derived, means one who has not sufficient mental capacity to make a will.[9]

§ 2. *Age; weakness; disease.*

Great age alone does not constitute testamentary disqualification,[10] but rather calls for protection and aid to further its wishes where the mind is capable of acting rationally.[11] Nor will old

[1] Den, Merritt, v. Johnson, 5 N. J. L. 454.

[2] Duffield v. Robeson, 2 Harr. (Del.) 375; Aubert v. Aubert, 6 La. Ann. 104; Kingsbury v. Whitaker, 32 La. Ann. 1055, 36 Am. Rep. 278; Wright v. Lewis, 5 Rich. L. 212, 55 Am. Dec. 714.

[3] Wright v. Lewis, 5 Rich. L. 212, 55 Am. Dec. 714.

[4] Kingsbury v. Whitaker, 32 La. Ann. 1055, 36 Am. Rep. 278.

[5] Cartwright v. Cartwright, 1 Phillim. Eccl. Rep. 90.

[6] Duffield v. Robeson, 2 Harr. (Del.) 375.

[7] Blough v. Parry (Ind.) 43 N. E. 560.

[8] Willett v. Porter, 42 Ind. 250.

[9] Stratton v. Morris, 89 Tenn. 497, 12 L. R. A. 70.

[10] Maverick v. Reynolds, 2 Bradf. 360; Bleecker v. Lynch, 1 Bradf. 458; Cornwell v. Riker, 2 Dem. 354; Van Alst v. Hunter, 5 Johns. Ch. 148; Spencer v. Moore, 4 Call(Va.) 423; Kirkwood v. Gordon, 7 Rich. L. 474, 62 Am. Dec. 418; Potts v. House, 6 Ga. 324, 50 Am. Dec. 329; Montague v. Allen, 78 Va. 592, 49 Am. Rep. 384; Nicholas v. Kershner, 20 W. Va. 251; Kerr v. Lunsford, 31 W.Va. 659, 2 L. R. A. 668.

[11] Maverick v. Reynolds, 2 Bradf. 360; Napfle's Estate, 46 Phila. Leg. Int. 57.

age and disease,[1] though accompanied by extreme distress and debility,[2] incapacitate a party from making a valid will where sufficient intelligence remains. And mere physical weakness, though it renders the testator unable to transact business, does not of itself incapacitate him from making a will.[3] Nor does physical weakness accompanied by disease,[4] though the testator was *in extremis* and died a few hours later from exhaustion.[5] And a person in a feeble condition from a complication of diseases, whose ideas were confused and whose mind wandered while under the influence of opiates, was not incompetent to execute a will where, when restored, which was readily done, his mind was clear and he plainly exhibited that he was in possession of all his faculties.[6] So, mere imbecility or weakness of mind,[7] or mental impairment, from whatever cause it may arise, will not defeat a will where the person making it retains sufficient understanding to appreciate its effect, where no fraud, misrepresentation, or undue influence is used,[8] where it does not severely impair the reasoning faculties or memory,[9] though it unfits the testator for the management of his estate,[10] unless the disposition attempted bears on its face extraordinary evidence of a deranged and powerless understanding.[11] Nor will impaired mental or

[1] Rutherford v. Morris, 77 Ill. 397; Creely v. Ostrander, 3 Bradf. 107.

[2] Higgins v. Carlton, 28 Md. 115, 92 Am. Dec. 666; Chrisman v. Chrisman, 16 Or. 127.

[3] Brown v. Riggin, 94 Ill. 560; Kimball v. Cuddy, 117 Ill. 213; Thompson v. Kyner, 65 Pa. 368; Stoutenburgh v. Hopkins, 43 N. J. Eq. 577; Re Henry's Will, 18 Misc. 149.

[4] Runkle v. Gates, 11 Ind. 95; Doyle's Estate, 7 Pa. Co. Ct. 657.

[5] O'Brien v. Dwyer, 45 N. J. Eq. 689; Hathorn v. King, 8 Mass. 371, 5 Am. Dec. 106.

[6] Collins v. Brazill, 63 Iowa, 432.

[7] Wade v. Holbrook, 2 Redf. 378; Potts v. House, 6 Ga. 324, 50 Am. Dec. 329.

[8] Re Soule, 22 Abb. N. C. 236; Wade v. Holbrook, 2 Redf. 378; Jamison v. Jamison, 3 Houst. (Del.) 108; Potts v. House, 6 Ga. 324, 50 Am. Dec. 329; Re Convey's Will, 52 Iowa, 197; Rice v. Rice, 50 Mich. 448, 53 Mich. 732; Waddington v. Buzby, 45 N. J. Eq. 173; Tenbrook v. Lee, 5 Clark (Pa.) 37; Tomkins v. Tomkins, 1 Bail. L. 92; Trezevant v. Rains, 85 Tex. 329; Kimball v. Cuddy, 117 Ill. 213.

[9] White v. Farley, 81 Ala. 563.

[10] Re Dyre's Estate, 12 Phila. 156.

[11] Re Elliott's Will, 2 J. J. Marsh, 340.

bodily powers affect the validity of a will where the testator knew what he was about and it was his free act.[1] So, infirmity of body and the abatement of intellectual vigor, upon the part of a testator, usually attending old age and disease, will not incapacitate him from making a valid will,[2] where the disease with which he is afflicted is not calculated directly to affect his mind.[3] It must amount to unsoundness of mind to affect the validity of the will, which means a want of understanding.[4]

§ 3. *Failure of memory.*

Mere failure of memory will not create testamentary incapacity unless it be total and extend to the testator's immediate family and property,[5] and incapacitate the testator from understanding the nature or condition of his property or the relation of those having claims upon his bounty.[6] Failure of memory, unless it be entire or extend to the immediate family and property of the

[1] Horn v. Pullman, 72 N. Y. 269. And see Kinne v. Kinne, 9 Conn. 102, 21 Am. Dec. 732.

[2] Eastis v. Montgomery, 95 Ala. 486; Leeper v. Taylor, 47 Ala. 221; Taylor v. Kelly, 31 Ala. 59, 68 Am. Dec. 150; McCulloch v. Campbell, 49 Ark. 367; Lodge v. Lodge, 2 Houst. (Del.) 419; Conway v. Vizzard, 122 Ind. 266; Watts v. Bullock, 1 Litt. (Ky.) 252; Sechrest v. Edwards, 4 Met. (Ky.) 163; Thompson v. Ish, 99 Mo. 160; Westcott v. Sheppard, 51 N. J. Eq. 315; Hampton v. Westcott, 49 N. J. Eq. 522; Wintermute v. Wilson, 28 N. J. Eq. 437; Turner v. Cheesman, 15 N. J. Eq. 243; Crolius v. Stark, 7 Lans. 311; Davis v. Culver, 13 How. Pr. 68; Lawrence v. Lawrence, 4 N. Y. Week. Dig. 299; Re Blair, 16 Daly, 540; Clarke v. Davis, 1 Redf. 249; Carroll v. Norton, 3 Bradf. 291; Tawney v. Long, 76 Pa. 106; Re Woodfall's Will, 7 Phila. 528.

[3] Turner v. Cheesman, 15 N. J. Eq. 243; Clarke v. Davis, 1 Redf. 249.

[4] Davis v. Culver, 13 How. Pr. 68; Thompson v. Ish, 99 Mo. 160; Wintermute v. Wilson, 28 N. J. Eq. 437; Leeper v. Taylor, 47 Ala. 221.

For Dr. Clevenger's discussion on this subject, see *Testamentary Capacity*, chap. VI.

[5] Yoe v. McCord, 74 Ill. 33; Re Storey's Will, 20 Ill. App. 183; Lowder v. Lowder, 58 Ind. 538; Jamison v. Jamison, 3 Houst. (Del.) 108; Prentis v. Bates, 88 Mich. 567; Turner v. Cheesman, 15 N. J. L. 243; Reynolds v. Root, 62 Barb. 250; Van Alst v. Hunter, 5 Johns. Ch. 148; Bleecker v. Lynch, 1 Bradf. 458; Re Woods' Estate, 13 Phila. 236; Re Hoppe's Estate, 7 W. N. C. 523; Montague v. Allen, 78 Va. 592, 49 Am. Rep. 384.

[6] Lawrence v. Lawrence, 4 N. Y. Week. Dig. 299; Re Woodfall's Will, 7 Phila. 528; Re Woods' Estate, 13 Phila. 236.

testator to the extent of rendering him unable to recall and retain the constituents of the business sufficiently long for its completion, is not of itself a legal standard of testamentary capacity.[1] And mere inability to remember the names of relatives not frequently seen, or the Christian name of a sister who is the mother of some of the beneficiaries, does not incapacitate the party from making a will.[2] Absolute loss of memory, however, destroys testamentary capacity.[3]

The jury in a will contest should not be restricted to inquiries involving memory alone and not reason and a knowledge of the actual obligations to relatives.[4] And an instruction that if the jury believe from the testimony of the subscribing witnesses that the testator was of unsound mind or memory they should find against the will, is erroneous in making an unwarrantable distinction between sound mind and sound memory.[5]

§ 4. *Eccentricity.*

In considering the question of testamentary capacity, care must be taken that singularity or eccentricity be not confounded with insanity.[6] A testator may have eccentricities and peculiarities and still do as he pleases with his property, if they are accompanied with sound judgment, discretion, and reason.[7] And perverse opinions and unreasonable prejudices do not constitute mental alienation.[8] The question whether or not a man is different from other men, and whether he indulges his humors in any

[1] Kramer v. Weinert, 81 Ala. 414.

[2] Kramer v. Weinert, 81 Ala. 414; Martin v. Thayer, 37 W. Va. 38.

[3] Lamb v. Lamb, 105 Ind. 456.

[4] Howard v. Coke, 7 B. Mon. 655.

[5] Yoe v. McCord, 74 Ill. 33.

For Dr. Clevenger's discussion on this subject, see *Memory, Senility.*

[6] Kinne v. Kinne, 9 Conn. 102, 21 Am. Dec. 732; Ekin v. McCracken, 11 Phila. 534.

[7] Ethridge v. Bennett, 9 Houst. (Del.) 295; Schneider v. Manning, 121 Ill. Potts v. House, 6 Ga. 324, 50 Am. Dec. 329; Ingoldsby v. Ingoldsby, 20 Grant, Ch. 131.

[8] Re Gross, 17 N. Y. S. R. 739; American Seamen's Friend Soc. v. Hopper, 33 N. Y. 619; Leech v. Leech, 5 Clark (Pa.) 86; Lee v. Lee, 4 McCord, L. 183, 17 Am. Dec. 722; Mercer v. Kelso, 4 Gratt. 106; Rush v. Megee, 36 Ind. 69; Gordon v. Morrow, 10 Ky. L. Rep. 845.

unaccustomed ways, is not a test of his sanity or insanity.[1] And no eccentricity or peculiarity of character or degree of moral depravity or unnatural feeling not amounting to destitution of reason or mental incompetency can be considered as insanity which will invalidate a will.[2] And eccentricity of conduct, and even partial aberration of mind at other times, will not affect testamentary capacity where the testator is shown to have been of sound and disposing mind at the time of making the will,[3] unless they evince an inability to make a reasonable disposition of property and to understand the nature and solemnity of the testamentary act.[4] The question as to when the bounds of eccentricity are passed and insanity commences depends upon the peculiar circumstances of each case, and is to be judged from the whole character of the person whose capacity is in question, and from his state and condition of mind, not only with respect to the immediate time in question, but at the immediate stages of his life.[5]

§ 5. *Capacity as compared with the character of the act.*

The rule was formerly laid down that the courts upon the question of testamentary capacity will never undertake to measure the size, degree, or extent of a man's understanding,[6] and that there is no middle ground between capacity and incapacity,[7] and that all persons are in law either of sound mind or of unsound mind.[8] Within this rule mere imbecility of mind on the part of the testator, however great, would not avoid his will provided he be not an idiot or a lunatic.[9] A person is capable of disposing of his property by will be he wise or unwise, unless totally deprived of

[1] Boughton v. Knight, L. R. 3 Prob. & Div. 64.

[2] Mullins v. Cottrell, 41 Miss. 291; Probst's Will, 2 Lanc. L. Rev. 97; Lee v. Lee, 4 McCord, L. 183, 17 Am. Dec. 722.

[3] Godden v. Burke, 35 La. Ann. 160; Wood v. Wood, 4 Brewst. 75; Hoby v. Hoby, 1 Hagg. Eccl. Rep. 146.

[4] Wood v. Wood, 4 Brewst. 75.

[5] Mudway v. Croft, 3 Curt. Eccl. Rep. 671.

For Dr. Clevenger's discussion on this subject, see *Eccentricity*.

[6] Jamison v. Jamison, 3 Houst. (Del.) 108; Duffield v. Robeson, 2 Harr. (Del.) 375; Stewart v. Lispenard, 26 Wend. 255.

[7] McElroy v. McElroy, 5 Ala. 81.

[8] Aikin v. Weckerly, 19 Mich. 482.

[9] Blanchard v. Nestle, 3 Denio, 37; Stewart v. Lispenard, 26 Wend. 255.

reason.[1] And mere feebleness of intellect not amounting to idiocy would not invalidate a will.[2] To invalidate it the incapacity must have amounted to an entire loss of intellect so that the testator was unable to understand what he was doing or the contents of the paper when read to him,[3] and his mind must have been so prostrated as to lose the government of reason and common sense.[4] The standard of testamentary capacity was found in the question whether the testator was *compos mentis* or *non compos mentis* according to the legal meaning of the terms,[5] and the term "unsound mind" as used in statutes with relation to wills was of the same signification as the term *non compos mentis*.[6] The question to be submitted to the jury was whether the testator had capacity to make a will, and not whether he had capacity to make the will in question,[7] and if *compos mentis* he could make any will however complicated, and if *non compos mentis* he could make no will however simple.[8] The later rule, however, which must be deemed to be now prevalent, if not universal, is that a total deprivation of reason is not necessary to destroy testamentary capacity,[9] and that the impairment of the mind of a testator need not amount to lunacy or absolute imbecility or idiocy in order to invalidate his will,[10] and he need not be in such a condition as to be an object for a commission of lunacy.[11] Within this rule the unsoundness of mind which will invalidate a will need not be

[1] Morris v. Stokes, 21 Ga. 152; Potts v. House, 6 Ga. 324, 50 Am. Dec. 329; Stewart v. Lispenard, 26 Wend. 255; Blanchard v. Nestle, 3 Denio, 37; Duffield v. Robeson, 2 Harr. (Del.) 375.

[2] Dornick v. Reichenback, 10 Serg. & R. 84; Newhouse v. Godwin, 17 Barb. 236.

[3] Crolius v. Stark, 7 Lans. 311.

[4] Leeper v. Taylor, 47 Ala. 221.

[5] Delafield v. Parish, 25 N. Y. 9; Ean v. Snyder, 46 Barb. 230; Blanchard v. Nestle, 3 Denio, 37.

[6] Blanchard v. Nestle, 3 Denio, 37. And see Re Forman, 54 Barb. 274.

[7] Yoe v. McCord, 74 Ill. 33; Delafield v. Parish, 25 N. Y. 9.

[8] Delafield v. Parish, 25 N. Y. 9; Legg v. Myer, 5 Redf. 628.

[9] Stubbs v. Houston, 33 Ala. 555; Abraham v. Wilkins, 17 Ark. 292; Pelamourges v. Clark, 9 Iowa, 1.

[10] Campbell v. Campbell, 130 Ill. 466, 6 L. R. A. 167; Daniel v. Daniel, 39 Pa. 191; McTaggart v. Thompson, 14 Pa. 149; Mountain v. Bennet, 1 Cox, Ch. Cas. 356.

[11] Mountain v. Bennet, 1 Cox, Ch. Cas. 356; Townsend v. Bogart, 5 Redf. 93.

such as to render the testator incapable of understanding that he is making a disposition of his property; it is sufficient if he is incapable of comprehending the nature and extent of his property and of knowing what persons he intended to provide for.[1] And the test of testamentary capacity is whether the testator at the time of making his will had mind and memory sufficient to make the will in question,[2] the term *compos mentis* not being regarded as a safe standard.[3] The strength of mind must be equal to the purpose to which it is applied.[4] And the competency of the testator should be judged by the nature of the act to be done from a consideration of all the circumstances,[5] the capacity to comprehend a few details and make a simple will not being sufficient for the disposal of a large estate by a complicated will requiring the recollection of many facts and the comprehension of many details,[6] and an instruction in an action to set aside a will on the ground of unsoundness of mind, that it is not necessary to show such unsoundness had anything to do with the manner of disposing of the property, is erroneous as recognizing but two conditions of the human mind, one sane and capable of doing all acts and the other insane and incapable of doing any act.[7] The Indiana statute providing that persons of unsound mind cannot make a valid will recognizes a condition not wholly sound when the testator possesses scope of mind and power to comprehend the nature of the act performed.[8] So, generally, less capacity is required to make a codicil than to make a will, though the question is always one of fact for the jury.[9]

[1] Young v. Ridenbaugh, 67 Mo. 574.

[2] Kempsey v. McGinniss, 21 Mich. 123; Re Forman, 54 Barb. 274; Kinleside v. Harrison, 2 Phillim. Eccl. Rep. 449.

[3] Townsend v. Bogart, 5 Redf. 93.

[4] Turner v. Cheesman, 15 N. J. Eq. 243; Garrison v. Blanton, 48 Tex. 299; Delaney v. Salina, 34 Kan. 532.

[5] Trish v. Newell, 62 Ill. 196; Marsh v. Tyrrell, 2 Hagg. Eccl. Rep. 84.

[6] Campbell v. Campbell, 130 Ill. 466, 6 L. R. A. 167; Trish v. Newell, 62 Ill. 196; Sheldon v. Dow, 1 Dem. 503. And see Marsh v. Tyrrell, 2 Hagg. Eccl. Rep. 84.

[7] Durham v. Smith, 120 Ind. 463.

[8] Young v. Miller (Ind.) 44 N. E. 757.

[9] Prather v. McClelland, 76 Tex. 574.

§ 6. *Delusion test.*

Delusion has been held to be the true test of the presence or absence of insanity,[1] and to be the only legal test.[2] And the rule has been laid down that delusion and insanity are almost, if not altogether, convertible terms so that a patient under a delusion on any subject in any degree is essentially insane on such subject;[3] and that strong, violent, and unjust prejudice not founded in delusion does not show mental incapacity which will invalidate a will.[4] But an exception to the delusion test has been made in cases of dementia or loss of mind and intellect,[5] and the contrary doctrine, that the absence or presence of delusion is not the true test of the absence or presence of insanity,[6] and that delusion cannot be said to be the only legal test as a rule of law,[7] would seem to be more in accordance with the tests given below. The existence of a delusion is evidence of insanity, but it is not conclusive.[8]

§ 7. *Test of capacity for criminal responsibility.*

It has been stated that the capacity and soundness of mind requisite to make a will are substantially the same as those required by the rule of responsibility in criminal cases,[9] but the contrary rule has been held,[10] and the general rule would seem to be that a less degree of incapacity is necessary to invalidate a will than would be a ground of acquittal in a criminal prosecution.[11]

[1] Dew v. Clark, 3 Add. Eccl. Rep. 79; Macklin's Case, 3 Coopt. Col. 257; Boughton v. Knight, L. R. 3 Prob. & Div. 64; Wheeler v. Alderson, 3 Hagg. Eccl. Rep. 574; Stanton v. Wetherwax, 16 Barb. 259. And see Burkhart v. Gladish, 123 Ind. 338.

[2] Re Forman, 54 Barb. 274.

[3] Boughton v. Knight, L. R. 3 Prob. & Div. 64, 28 L. T. N. S. 562; Smith v. Tebbitt, L. R. 1 Prob. & Div. 401.

[4] Den, Trumbull, v. Gibbons, 22 N. J. L. 117.

[5] American Seamen's Friend Soc. v. Hopper, 33 N. Y. 619; Re Shaw's Will, 2 Redf. 107.

[6] Denson v. Beazley, 34 Tex. 191.

[7] Manhattan L. Ins. Co. v. Broughton, 109 U. S. 121, 27 L. ed. 878.

[8] Gardner v. Lamback, 47 Ga. 133.

For Dr. Clevenger's discussion on this subject, see *Delusion, Tests of Insanity*, chap. II.

[9] Delaney v. Selina, 34 Kan. 534.

[10] Prentis v. Bates, 88 Mich. 567. And see Smith v. Smith, 75 Ga. 477.

[11] McTaggart v. Thompson, 14 Pa. 149.

For Dr. Clevenger's discussion on this subject, see *Responsibility*, chap. VI.

§ 8. *Test of capacity to contract.*

Under the Maryland statute[1] a person capable of executing a valid deed or contract has capacity to execute and acknowledge a will or codicil.[2] And a testator must have sufficient capacity to make a disposition of his estate with judgment and understanding with reference to the extent of his property and the relative claims of the different persons who would or might have been the objects of his bounty.[3] And it was held in an English case that a testamentary disposition involves a larger and higher survey of facts than is needed to enter into the ordinary contracts of life, and a higher degree of capacity is required to make a will than an ordinary contract;[4] but the judge who decided it subsequently explained his decision in a note[5] as meaning, whatever is the highest degree of soundness, that is required to make a will. So, the rule has been laid down, irrespective of statutes, that the same degree of mental capacity will suffice for the making of a valid will as is required for the making of a valid deed or contract;[6] and that knowledge on the part of a testator as to what he is about, and as to the consequences of what he is doing, together with sufficient capacity to contract, constitutes testamentary capacity.[7] But the rule would appear to have been better expressed in cases holding that it requires no greater mental capacity to make a valid will than to make a valid deed or contract,[8] as the capacity to make a contract as a test of testamentary capacity has been repudiated,[9] the weight of authority holding that one may make a valid will though his capacity is less than would be required

[1] Maryland act 1798, chap. 101.

[2] Tyson v. Tyson, 37 Md. 567.

[3] Higgins v. Carlton, 28 Md. 115, 92 Am. Dec. 666; Davis v. Calvert, 5 Gill & J. 300, 25 Am. Dec. 282.

[4] Boughton v. Knight, L. R. 3 Prob. & Div. 64, 28 L. T. N. S. 562.

[5] Boughton v. Knight, L. R. 3 Prob. & Div. 72, 28 L. T. N. S. 562.

[6] Stewart v. Elliott, 2 Mackey, 307; McElroy v. McElroy, 5 Ala. 81; Coleman v. Robertson, 17 Ala. 84.

[7] Comstock v. Hadlyme Eccl. Soc. 8 Conn. 254, 20 Am. Dec. 100.

[8] Schneider v. Manning, 121 Ill. 376; Chandler v. Barrett, 21 La. Ann. 58, 99 Am. Dec. 701; Rice v. Rice, 50 Mich. 448, 53 Mich. 432; Ford v. Ford, 7 Humph. 92.

[9] Kirkwood v. Gordon, 7 Rich. L. 474, 62 Am. Dec. 418; Maddox v. Maddox, 114 Mo. 35, 35 Am. St. Rep. 735.

to make a contract or deed,[1] or manage his estate,[2] as in making contracts the parties stand at arms' length and are opposed to each other,[3] and that a will should not be set aside on as slight evidence of mental incapacity as would be sufficient to overturn a contract or deed or a gift *inter vivos*.[4] Failure to instruct the jury, however, that less capacity would suffice to make a valid will than would be required in making contracts, is not error where no special charge was requested.[5] Nor would such an instruction be necessary, as the jury would not be presumed to know what degree of capacity the law requires to make a contract.[6]

§ 9. *Test of capacity to transact ordinary business.*

Sufficient mind and memory for the transaction of ordinary business have been adopted by some of the cases as the test of testamentary capacity.[7] Within this rule it is sufficient if the testator is capable of acting rationally in the ordinary affairs of life,[8] and capacity to know and understand the extent of his property, who his relatives are and their claims upon his bounty, and how

[1] Lemon v. Jenkins, 48 Ga. 313; Potts v. House, 6 Ga. 324, 50 Am. Dec. 329; Meeker v. Meeker, 74 Iowa, 352; Wise v. Foote, 81 Ky. 10; Howard v. Coke, 7 B. Mon. 655; Aubert v. Aubert, 6 La. Ann. 104; Prentis v. Bates, 88 Mich. 567; Brinkman v. Rueggesick, 71 Mo. 553; Stewart v. Lispenard, 26 Wend. 255; Paine v. Roberts, 82 N. C. 451; Re McCann, 2 Pa. Dist. R. 181; Kirkwood v. Gordon, 7 Rich. L. 478, 62 Am. Dec. 418; Prather v. McClelland, 76 Tex. 574; Vance v. Upson, 66 Tex. 476; Converse v. Converse, 21 Vt. 168, 52 Am. Dec. 58; Nicholas v. Kershner, 20 W. Va. 251; Kerr v. Lunsford, 31 W. Va. 659, 2 L. R. A. 668; Den, Stevens, v. Vancleve, 4 Wash. C. C. 262; Harrison v. Rowan, 3 Wash. C. C. 580.

[2] Howard v. Coke, 7 B. Mon. 655; Brinkman v. Rueggesick, 71 Mo. 553; Harrison v. Rowan, 3 Wash. C. C. 580.

[3] Wise v. Foote, 81 Ky. 10.

[4] Clarke v. Sawyer, 3 Sandf. Ch. 351.

[5] Cockrill v. Cox, 65 Tex. 676.

[6] Brown v. Mitchell, 88 Tex. 350.

[7] Coleman v. Robertson, 17 Ala. 84; Keithley v. Stafford, 126 Ill. 507; Brown v. Riggin, 94 Ill. 560; Carpenter v. Calvert, 83 Ill. 62; Rutherford v. Morris, 77 Ill. 397; Meeker v. Meeker, 75 Ill. 260; Re Storey's Will, 20 Ill. App. 183; Reed's Will, 2 B. Mon. 79; Barnes v. Barnes, 66 Me. 286; Harvey v. Sullens, 46 Mo. 147, 2 Am. Rep. 491; Tomkins v. Tomkins, 1 Bail. L. 92.

[8] Brown v. Riggin, 94 Ill. 560.

he wishes to dispose of his property, and hold all of these things in his mind at the same time, is not necessary.[1] What is necessary is that the testator should have capacity to reason correctly and understand the relation of cause and effect in ordinary business affairs.[2] And buying and selling property, settling accounts, collecting and paying out and borrowing and loaning money, and making contracts and conveyances, constitute the transaction of ordinary business, the capacity to do which shows capacity to dispose of property by will.[3] Many of the later cases, however, have combined the test of capacity to transact ordinary business with a requirement of capacity to understand the business engaged in in making the will,[4] and to understand and comprehend the disposition made of the property and the nature and effect of the provisions of the will,[5] and to select the objects of one's bounty.[6] And the test of capacity to transact ordinary business has been expressly repudiated by some of the cases,[7] holding that less capacity is required to make a valid will than to transact ordinary business;[8] and that a person is not necessarily incapacitated from making a will because his mind and memory are so much impaired as to render him incompetent to manage his ordinary affairs;[9] and that a testator need not have such capacity as would justify his engaging in complicated and intricate business;[10] and that one who has sufficient knowledge and memory to fully and rationally comprehend the effect of what he is doing and appreciate his relations to the natural objects of his bounty, and understand the character and effect of the provisions of his will, is competent to

[1] Carpenter v. Calvert, 83 Ill. 62.

[2] Meeker v. Meeker, 75 Ill. 260.

[3] Francis v. Wilkinson, 147 Ill. 370; Meeker v. Meeker, 75 Ill. 260; Reed's Will, 2 B. Mon. 79; Hoban v. Campau, 52 Mich. 346.

[4] Schneider v. Manning, 121 Ill. 376.

[5] Keithley v. Stafford, 126 Ill. 507; Farmer v. Farmer, 129 Mo. 530; Myers v. Hauger, 98 Mo. 433; Benoist v. Murrin, 58 Mo. 307; Harvey v. Sullens, 56 Mo. 372.

[6] Freeman v. Easly, 117 Ill. 317; Norton v. Paxton, 110 Mo. 456.

[7] Stubbs v. Houston, 33 Ala. 555.

[8] Thompson v. Kyner, 65 Pa. 368.

[9] Whitney v. Twombly, 136 Mass. 145; Re Dyre's Estate, 12 Phila. 156.

[10] Converse v. Converse, 21 Vt. 168, 52 Am. Dec. 53.

make one, though he may not be capable of managing business generally.[1]

§ 10. *Test of capacity to understand the transaction.*

Probably as an outgrowth of the doctrine that the capacity to perform a testamentary act should conform to its difficulty and intricacy, many of the cases have referred the degree required to the particular transaction in question, stating the test to be whether the testator's mind and memory were sufficiently sane to enable him to understand the business in which he was engaged;[2] whether he was able to understand that he was disposing of his estate by will and to whom he was giving it;[3] and whether he appreciated the effects of the transaction.[4] And knowledge on

[1] St. Leger's Appeal, 34 Conn. 434, 91 Am. Dec. 735; Kinne v. Kinne, 9 Conn. 102, 21 Am. Dec. 732; Nicholas v. Kershner, 20 W. Va. 251; Kerr v. Lunsford, 31 W. Va. 659, 2 L. R. A. 668. And see tests given in subsequent sections.

For Dr. Clevenger's discussion on this subject, see *Imbecility, Paretic Dementia, Symptoms, Senility.*

[2] Stubbs v. Houston, 33 Ala. 555; Abraham v. Wilkins, 17 Ark. 292; Ethridge v. Bennett, 9 Houst. (Del.) 295; Lodge v. Lodge, 2 Houst. (Del.) 419; Cordrey v. Cordrey, 1 Houst. (Del.) 269; Sutton v. Sutton, 5 Harr. (Del.) 459; Chandler v. Ferris, 1 Harr. (Del.) 454; Campbell v. Campbell, 130 Ill. 466, 6 L. R. A. 167; Yoe v. McCord, 73 Ill. 33; Pittard v. Foster, 12 Ill. App. 133; Conway v. Vizzard, 122 Ind. 266; Runkle v. Gates, 11 Ind. 95; Webber v. Sullivan, 58 Iowa, 260; Re Convey's Will, 52 Iowa, 197; Kingsbury v. Whitaker, 32 La. Ann. 1055, 36 Am. Rep. 278; Young v. Ridenbaugh, 67 Mo. 574; McClintock v. Curd, 32 Mo. 411, 4 L. R. A. 738; Middleditch v. Williams, 45 N. J. Eq. 726, 4 L. R. A. 738; Frost v. Wheeler, 43 N. J. Eq. 573; Den, Trumbull, v. Gibbons, 22 N. J. L. 117; Andress v. Weller, 3 N. J. Eq. 604; Re Snelling's Will, 136 N. Y. 515; Re Flansburgh, 82 Hun, 49; Barnhardt v. Smith, 86 N. C. 473; Paine v. Roberts, 82 N. C. 451; Re McCullough's Will, 35 Pittsb. L. J. 169; Cornelius v. Cornelius, 7 Jones, L. 593; Horne v. Horne, 9 Ired. L. 99; Zeltner v. Bodman German Protestant Widow's Home, 1 Ohio Dec. 306; Chrisman v. Chrisman, 16 Or. 127; Shaver v. McCarthy, 110 Pa. 339; Thompson v. Kyner, 65 Pa. 368; Re Restine, 3 W. N. C. 27; Wisener v. Maupin, 2 Baxt. 342.

[3] Jamison v. Jamison, 3 Houst. (Del.) 108; Cordrey v. Cordrey, 1 Houst. (Del.) 269; Re Restine, 3 W. N. C. 27; Re Rodger's Estate, 19 W. N. C. 383; Garrison v. Blanton, 48 Tex. 299.

[4] Campbell v. Campbell, 130 Ill. 466, 6 L. R. A. 167; Webber v. Sullivan, 58 Iowa, 260; Re Convey's Will, 52 Iowa, 197; Kingsbury v. Whitaker, 32 La. Ann. 1055, 36 Am. Rep. 278; Re Flansburgh, 82 Hun, 49.

the part of a testator of what he was about, and how he was disposing of his property, and a purpose to do so, was held to constitute testamentary capacity.[1] It is capacity to understand the business engaged in which is required, and not merely capacity to understand the act which he is performing, that act being simply the making and signing of a will.[2] But it is sufficient if he has knowledge to comprehend the condition of his property, and the scope, meaning, and effect of the provisions of his will.[3] He must have ability to remember and call to mind all the items of his property, and to know and appreciate as well as to remember the value of each item, or at least each subject of ownership.[4] And he must be capable of weighing to a reasonable degree the consequences of his will and its effect upon his estate and family;[5] and have sufficient understanding to determine whether the will makes the desired disposition.[6] But he need not be competent to view his will with the eye of a lawyer and comprehend the legal effect of its provisions; it is sufficient if he has such mind and memory as will enable him to understand the elements of which it is composed and the disposition of his property in its simple forms.[7] The ability of a testator to criticise accurately the terms and provisions of his proposed will or the estates created thereby is not a correct test of testamentary capacity.[8] And testamentary capacity is to be determined by the capacity of the testator to understand what he is doing, and not by his actual knowledge or understanding thereof.[9]

§ 11. *Combined test; capacity to understand claims to bounty.*

The test which is best supported by authority, and which may be deemed to be the general rule of testamentary capacity, com-

[1] Sutton v. Sutton, 5 Harr. (Del.) 459; Horn v. Pullman, 72 N. Y. 269.
[2] Pittard v. Foster, 12 Ill. App. 142.
[3] Cornwell v. Riker, 2 Dem. 354.
[4] Reichenbach v. Ruddach, 127 Pa. 564.
[5] Re Convey's Will, 52 Iowa, 197.
[6] Young v. Ridenbaugh, 67 Mo. 574.
[7] Harrison v. Rowan, 3 Wash. C. C. 580; Young v. Ridenbaugh, 67 Mo. 574.
[8] Gaither v. Gaither, 20 Ga. 709.
[9] Brown v. Mitchell, 75 Tex. 9.

For Dr. Clevenger's discussion on this subject, see *Senility, Senile Dementia, Imbecility.*

bines the requirement of capacity to understand the transaction with ability to understand the nature and merit of the claims of persons who are or might naturally be the objects of the testator's bounty. This test is, whether the testator had capacity to understand the nature of the business in which he was engaged and ability to recollect and comprehend the condition of the property he wished to dispose of, and understand and decide upon the method of its distribution, and knowledge, memory, and capacity to comprehend his relations to the persons who are or might naturally be the objects of his bounty, and the relative merits of their claims;[1]

[1] Eastis v. Montgomery, 95 Ala. 486; Knox v. Knox, 95 Ala. 495; Taylor v. Kelly, 31 Ala. 59, 68 Am. Dec. 150; Kramer v. Weinert, 81 Ala. 414; Bulger v. Ross, 98 Ala. 267; McCulloch v. Campbell, 49 Ark. 367; Cordrey v. Cordrey, 1 Houst. (Del.) 269; Dunham's Appeal, 27 Conn. 192; Stancell v. Kenan, 33 Ga. 56; Ragan v. Ragan, 33 Ga. Supp. 106; Hall v. Hall, 18 Ga. 40; Roe v. Taylor, 45 Ill. 485; Trish v. Newell, 62 Ill. 196; Burkhart v. Gladish, 123 Ind. 338; Lowder v. Lowder, 58 Ind. 538; Rush v. Megee, 36 Ind. 69; Meeker v. Meeker, 74 Iowa, 352; Godden v. Burke, 35 La. Ann. 160; Brown v. Ward, 53 Md. 393, 36 Am. Rep. 422; Whitney v. Twombly, 136 Mass. 145; Beaubien v. Cicotte, 12 Mich. 459; McHugh v. Fitzgerald, 103 Mich. 21; Young v. Otto, 57 Minn. 307; Couch v. Gentry, 113 Mo. 248; Thompson v. Ish, 99 Mo. 160; Jackson v. Hardin, 83 Mo. 175; Young v. Ridenbaugh, 67 Mo. 574; Howell v. Taylor, 50 N. J. Eq. 428; Westcott v. Sheppard, 51 N. J. Eq. 315; Hampton v. Westcott, 49 N. J. Eq. 522; Smith v. Smith, 48 N. J. Eq. 566; Clifton v. Clifton, 47 N. J. Eq. 227; Re Lee, 46 N. J. Eq. 193; McCoon v. Allen, 45 N. J. Eq. 708; Waddington v. Busby, 45 N. J. Eq. 173; O'Brien v. Dwyer, 45 N. J. Eq. 689; Stoutenburgh v. Hopkins, 43 N. J. Eq. 577; Bennett v. Bennett, 50 N. J. Eq. 439; Lowe v. Williamson, 2 N. J. Eq. 82; Sloan v. Maxwell, 3 N. J. Eq. 563; Andress v. Weller, 3 N. J. Eq. 604; Howell v. Taylor, 50 N. J. Eq. 428; Swenarton v. Hancock, 9 Abb. N. C. 326; Re Soule, 22 Abb. N. C. 236; Lawrence v. Lawrence, 4 N. Y. Week. Dig. 299; Leech v. Leech, 5 Clark (Pa.) 86; Tenbrook v. Lee, 5 Clark (Pa.) 37; Re Blair, 16 Daly, 540; Kinne v. Johnson, 60 Barb. 69; Reynolds v. Root, 62 Barb. 250; Watson v. Donnelly, 28 Barb. 653; Re Henry's Will, 18 Misc. 149; Snyder v. Sherman, 23 Hun, 139; Forman v. Smith, 7 Lans. 443; Re Mabie, 5 Misc. 179; Townsend v. Bogart, 5 Redf. 93; Wade v. Holbrook, 2 Redf. 378; Re Wheeler, 5 Misc. 279; Re Kiedaisch's Will, 2 Connoly, 438; Clark v. Fisher, 1 Paige, 171, 19 Am. Dec. 402; Bost v. Bost, 87 N. C. 477; Clark v. Ellis, 9 Or. 128; Hubbard v. Hubbard, 7 Or. 42; Chrisman v. Chrisman, 16 Or. 127; Shaver v. McCarthy, 110 Pa. 339; Wilson v. Mitchell, 101 Pa. 495; Tawney v. Long, 76 Pa. 106; Pidcock v. Potter, 68 Pa. 348, 8 Am. Rep. 181; Stevenson v. Stevenson, 33 Pa. 471; Daniel v. Daniel, 39 Pa.

and capable of making a rational selection among them,[1] according to a settled purpose of his own,[2] and of knowing whether he has done anything for any such persons having claims upon his justice or generosity,[3] and of keeping such facts in his mind long enough to have his will prepared and executed.[4] He must have capacity to recollect the claims of those who are excluded from participating in his bounty as well as those who participate in it,[5] and be competent to understand the scope and meaning of the provisions of his will[6] and the manner in which it distributes his property,[7] and have capacity to comprehend the relation of

191; Re Doyle's Estate, 7 Pa. Co. Ct. 657; Horbach v. Denniston, 3 Pittsb. 49; Philadelphia Trust & S. D. Co. v. Drinkhouse, 17 Phila. 23; Re Woodfall's Will, 7 Phila. 528; Wood v. Wood, 4 Brewst. 75; Re Rodger's Estate, 19 W. N. C. 383; Re McKim's Estate, 9 Pa. Co. Ct. 209; Kirkwood v. Gordon, 7 Rich. L. 474, 62 Am. Dec. 418; Prather v. McClelland, 76 Tex. 574; Trezevant v. Rains, 85 Tex. 329; Converse v. Converse, 21 Vt. 168, 52 Am. Dec. 58; Harrison v. Rowan, 3 Wash. C. C. 580; Martin v. Thayer, 37 W. Va. 38; Nicholas v. Kershner, 20 W. Va. 251; Kerr v. Lunsford, 31 W. Va. 659, 680, 2 L. R. A. 668; Ballantine v. Proudfoot, 62 Wis. 216; Re Farnsworth's Will, 62 Wis. 474; Holden v. Meadows, 31 Wis. 284; Re Blakely's Will, 48 Wis. 294; Den, Stevens, v. Vancleve, 4 Wash. C. C. 262; Greenwood v. Greenwood, 3 Curt. Eccl. Rep. 337; Ingoldsby v. Ingoldsby, 20 Grant, Ch. 131; Sefton v. Hopwood, 1 Fost. & F. 578; Goldie v. Murray, 6 Jur. 608; Banks v. Goodfellow, 22 L. T. N. S. 820; Harwood v. Baker, 3 Moore, P. C. 282.

[1] Forman v. Smith, 7 Lans. 443; Kinne v. Johnson, 60 Barb. 69; Clark v. Fisher, 1 Paige, 171, 19 Am. Dec. 402; Hall v. Hall, 18 Ga. 40; Stancell v. Kenan, 33 Ga. 56; Smith v. Smith, 48 N. J. Eq. 566; Stoutenburgh v. Hopkins, 43 N. J. Eq. 577; Lawrence v. Steel, 66 N. C. 584; Re Farnsworth's Will, 62 Wis. 474.

[2] Re Shropshire's Will, 5 J. J. Marsh. 15; Newcomb v. Newcomb, 16 Ky. L. Rep. 376; Phillips v. Phillips, 81 Ky. 329.

[3] Reynolds v. Root, 62 Barb. 250.

[4] Townsend v. Bogart, 5 Redf. 93; Re Henry's Will, 18 Misc. 149.

[5] McCulloch v. Campbell, 49 Ark. 367; Meeker v. Meeker, 74 Iowa, 352; Beaubien v. Cicotte, 12 Mich. 459; Goldie v. Murray, 6 Jur. 608.

[6] Re Wheeler, 5 Misc. 279; Wade v. Holbrook, 2 Redf. 378; Snyder v. Sherman, 23 Hun, 139; Bost v. Bost, 87 N. C. 477; Chrisman v. Chrisman, 16 Or. 127; Sefton v. Hopwood, 1 Fost. & F. 578.

[7] McCoon v. Allen, 45 N. J. Eq. 708; Re Lee, 46 N. J. Eq. 193; O'Brien v. Dwyer, 45 N. J. Eq. 689; Clifton v. Clifton, 47 N. J. Eq. 227; Hampton v. Westcott, 49 N. J. Eq. 522; Westcott v. Sheppard, 51 N. J. Eq. 315; Cordrey v. Cordrey, 1 Houst. (Del.) 269; Pidcock v. Potter, 68 Pa. 348, 8 Am.

each of these factors to each other;[1] though it is not necessary that he should be able to collect all these in one comprehensive view.[2]

In passing upon testamentary capacity, however, it is not necessary to show that the testator actually understood the business in which he was engaged and comprehended his property and recollected the natural objects of his bounty; it is sufficient if he was capable of doing so.[3] And he need not have a recollection of the property he intends to dispose of or the persons related to him, when he intends to give his whole estate to a stranger to the exclusion of his relatives.[4] Nor is it necessary that he should name all of his children or give each of them a portion of his estate; it is sufficient if he was mentally capable of understanding the disposition he was making and acting freely.[5] Nor is it necessary that he should correctly ascertain the legal status of each person who apparently stands in a natural relation to him,[6] or understand and appreciate the legal effect of all the provisions of the will.[7] And he need not be capable of discussing the feelings and relations, connections and obligations of family and blood, and of recollecting the number, condition, and extent of those who are the proper objects of his bounty, and also of weighing their deserts with respect to conduct and capacity, remembering all and forgetting none.[8] Nor need he understand the number and condition of his relatives or their

Rep. 181; Thompson v. Kyner, 65 Pa. 368; Shaver v. McCarthy, 110 Pa. 339; Webber v. Sullivan, 58 Iowa, 260; Reynolds v. Root, 62 Barb. 250; Franke v. Shipley, 22 Or. 104; Lawrence v. Steel, 66 N. C. 584.

[1] Westcott v. Sheppard, 51 N. J. Eq. 315; Hampton v. Westcott, 49 N. J. Eq. 522; Clifton v. Clifton, 47 N. J. Eq. 227; Re Lee, 46 N. J. Eq. 193; O'Brien v. Dwyer, 45 N. J. Eq. 689; Knox v. Knox, 95 Ala. 495; Kramer v. Weinert, 81 Ala. 414.

[2] Pidcock v. Potter, 68 Pa. 348, 8 Am. Rep. 181; Shaver v. McCarthy, 110 Pa. 339; McMasters v. Blair, 29 Pa. 298.

[3] Trezevant v. Rains, 85 Tex. 329; Kerr v. Lunsford, 31 W. Va. 659, 680, 2 L. R. A. 668.

[4] Stevenson v. Stevenson, 33 Pa. 469.

[5] Kerr v. Lunsford, 31 W. Va. 659, 680, 2 L. R. A. 668.

[6] Smith v. Smith, 48 N. J. Eq. 566.

[7] Barker v. Comins, 110 Mass. 477.

[8] Couch v. Gentry, 113 Mo. 248. And see McMasters v. Blair, 29 Pa. 298.

relative claims upon his bounty, or know and understand the reason for giving or withholding his bounty as to any and every one of them,[1] or recall all that he had done for each of the persons coming within the reasonable range of his bounty.[2] It is only necessary that he should understand fairly and rationally the nature of his property and the disposition he wishes to make.[3]

§ 12. *Test of capacity to collect, hold, and consider the facts.*

Many well-considered cases have laid down the rule that a testator must have sufficient active memory to collect in his mind without prompting the parts or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and to be able to form some rational judgment in regard to them,[4] and to dictate his will.[5] It is not sufficient that the testator is merely able to answer familiar and usual questions.[6] This rule has been criticised, however, as not being well adapted to practical use as a test of testamentary capacity,[7] and as requiring too high a degree of mental capacity.[8]

§ 13. *Time of application of tests.*

The point of time to be considered at which the capacity of

[1] Spratt v. Spratt, 76 Mich. 384.

[2] Couch v. Gentry, 113 Mo. 248.

[3] Philadelphia Trust & S. D. Co. v. Drinkhouse, 17 Phila. 23; Pidcock v. Potter, 68 Pa. 348, 8 Am. Rep. 181; Shaver v. McCarthy, 110 Pa. 339; Re Rodger's Estate, 19 W. N. C. 383.

[4] Bulger v. Ross, 98 Ala. 267; McCulloch v. Campbell, 49 Ark. 367; Yoe v. McCord, 73 Ill. 33; Burkhart v. Gladish, 123 Ind. 338; Lowder v. Lowder, 58 Ind. 538; Rush v. Megee, 36 Ind. 69; McHugh v. Fitzgerald, 103 Mich. 21; Spratt v. Spratt, 76 Mich. 364; Aikin v. Weckerly, 19 Mich. 482; Van Guysling v. Van Kuren, 35 N. Y. 70; Delafield v. Parish, 25 N. Y. 9; Re Mabie, 5 Misc. 179; Prather v. McClelland, 76 Tex. 574; McMaster v. Scriven, 85 Wis. 162; Re Lewis's Will, 51 Wis. 101; Holden v. Meadows, 31 Wis. 284.

[5] Spratt v. Spratt, 76 Mich. 384.

[6] Aikin v. Weckerly, 19 Mich. 482.

[7] St. Leger's Appeal, 34 Conn. 434.

[8] Trish v. Newell, 62 Ill. 196.

the testator is to be tested is that at which the will was executed,[1] and the capacity of the testator to make a will is to be determined by what happened at that time rather than by what happened at other times.[2] And where the testator was rational, intelligent, and understood what he was doing when the will was made, it is valid, however incompetent he may have been at other times.[3] Where there are one or more codicils to a will, however, capacity at the date of the execution of one of them renders that act valid as well as all preceding acts.[4] And the will of a testator who had sufficient strength and soundness of mind to make a disposition of his property when he gave instructions for preparing it, and actual intent to execute it when written as his will, is valid and entitled to probate, though he had grown much worse and did not have testamentary capacity when it was signed.[5]

§ 14. *Partial insanity defined.*

Partial insanity or monomania is a perversion of the understanding in regard to a single object or a small number of objects with a predominance of mental excitement.[6] A morbid affection of the mind, consisting in a mental or moral perversion, or both, in regard to some particular subject or class of subjects.[7] It is not some intermediate stage in the development of mental derangement, but a disturbance at some particular point, not involving the mind at any other point.[8] Monomania and eccentricity differ in that the monomaniac has become one by a change of the character, while the eccentric man always was singular in

[1] Terry v. Buffington, 11 Ga. 337, 56 Am. Dec. 423; Yoe v. McCord, 73 Ill. 33; Holloway v. Galloway, 51 Ill. 159; Clark v. Ellis, 9 Or. 128; Reichenbach v. Ruddach, 127 Pa. 564; Thompson v. Kyner, 65 Pa. 368; Re McCullough's Will, 35 Pittsb. L. J. 169; Martin v. Thayer, 37 W. Va. 38; Nicholas v. Kershner, 20 W. Va. 251; Kerr v. Lunsford, 31 W. Va. 659, 680, 2 L. R. A. 668; Den, Stevens, v. Vancleve, 4 Wash. C. C. 262; White v. Wilson, 13 Ves. Jr. 87.

[2] Clark v. Davis, 1 Redf. 249; Godden v. Burke, 35 La. Ann. 160.

[3] Philadelphia Trust & S. D. Co. v. Drinkhouse, 17 Phila. 23.

[4] Brown v. Riggin, 94 Ill. 560; Mairs v. Freeman, 3 Redf. 181.

[5] Weems v. Weems, 19 Md. 334.

[6] Re Gannon's Will, 3 Misc. 329.

[7] Chaney v. Bryan, 16 Lea, 67.

[8] Taylor v. Trich, 165 Pa. 586.

his ideas and actions, though eccentric habits suddenly acquired are presumptive evidence of insanity.[1]

§ 15. *What partial insanity affects testamentary capacity.*

The doctrine was maintained by some of the earlier English cases that the mind of man was indivisible, and the expression "partial insanity" is an incorrect phrase, and that a mind which is actually unsound at all times upon one subject cannot be deemed sound on other subjects,[2] and that a will made by a person having such a mind, though apparently rational and proper, and though the infirmity had no bearing upon the testamentary disposition and was only discoverable when the mind was addressed to certain subjects to the exclusion of all others, was invalid.[3] But this doctrine was repudiated later in a well-considered and authoritative case.[4] And the rule may now be said to be universal, or nearly so, that the theory of medical science, that there is no such thing as partial insanity and that a man is either sane or insane, is not true in law;[5] and that to establish unsoundness of mind it is not necessary that it should be general, it is sufficient if proved to exist on one or more subjects, though in all other respects the individual may conduct himself with the utmost propriety.[6] Within this rule partial insanity or monomania invalidates a will, which is its direct offspring,[7] or where the will was in any way the effect of or the result of such insanity, though the testator's general capacity was unimpeached.[8] And where a testator is a monomaniac it must appear that his will was

[1] Ekin v. McCracken, 11 Phila. 534.

For Dr. Clevenger's discussion on this subject, see *Partial Insanity, Monomania.*

[2] Waring v. Waring, 12 Jur. 947, 6 Moore, P. C. 341.

[3] Waring v. Waring, 12 Jur. 947, 6 Moore, P. C. 341; Smith v. Tebbitt, L. R. 1 Prob. & Div. 398, 16 L. T. N. S. 841.

[4] Banks v. Goodfellow, 22 L. T. N. S. 820.

[5] Re Blakely's Will, 48 Wis. 294.

[6] Fowlis v. Davidson, 6 Notes of Cases, 461.

[7] Merrill v. Rolston, 5 Redf. 220; Cotton v. Ulmer, 45 Ala. 378, 6 Am. Rep. 703; Thomas v. Carter, 170 Pa. 272; Lucas v. Parsons, 24 Ga. 640, 71 Am. Dec. 147; Potts v. House, 6 Ga. 324, 50 Am. Dec. 329; Dew v. Clark, 1 Add. Eccl. Rep. 279, 3 Add. Eccl. Rep. 79; Puryear v. Reese, 6 Coldw. 21.

[8] Gardner v. Lamback, 47 Ga. 133.

in no way the result of or connected with the mania.[1] But a will to be invalidated by partial insanity or monomania must have been directly produced by it,[2] and it must have amounted to such an insane delusion as renders the testator incapable of reasoning on that particular subject, and shows that he assumes to believe to be true that which has no foundation in reason or fact;[3] and be such that the morbid image in his mind is connected by him with and has perverted his judgment in relation to his acts which are drawn in question.[4] And it must relate to the person to be affected as well as the subject-matter to be disposed of,[5] though an heir at law may complain of any mania on the part of his testator which diverts the inheritance from him, whether it was directed against him or another.[6]

Where a testator possesses reason and capacity on the subject of disposing of his property by will the mere fact that he does not have reason and capacity on some other subject is not sufficient to invalidate his will.[7] A derangement of the faculties cannot operate to incapacitate a person to make a will where it does not render him incapable of acting rationally in the ordinary affairs of life or manifest itself in the testamentary provisions.[8]

The phrase "of unsound mind," in the Indiana statute with reference to competency to make a will, however, is held to include every species of unsoundness of mind whether partial or complete.[9] And an instruction in a will contest, that although a person may be to some extent insane when he executes a will

[1] Gardner v. Lamback, 47 Ga. 133.

[2] Benoist v. Murrin, 58 Mo. 307.

[3] Haines v. Hayden, 95 Mich. 332.

[4] Owing's Case, 1 Bland, Ch. 370, 17 Am. Dec. 311

[5] Gardner v. Lamback, 47 Ga. 133.

[6] Wetter v. Habersham, 60 Ga. 194.

[7] James v. Langdon, 7 B. Mon. 193; Kingsbury v. Whitaker, 32 La. Ann. 1055, 36 Am. Rep. 278; Lucas v. Parsons, 24 Ga. 640, 71 Am. Dec. 147; Wetter v. Habersham, 60 Ga. 194. And see Re Rodger's Estate, 19 W. N. C. 383.

[8] Fraser v. Jennison, 42 Mich. 206; Stackhouse v. Horton, 15 N. J. Eq. 203; Pidcock v. Potter, 68 Pa. 348, 8 Am. Rep. 181; Banks v. Goodfellow, 22 L. T. N. S. 820.

[9] Willett v. Porter, 42 Ind. 250; Eggers v. Eggers, 57 Ind. 461; Burkhart v. Gladish, 123 Ind. 338.

such insanity will not avoid it unless it is shown to have entered into or affected it, is erroneous.[1]

§ 16. *Insane delusions defined.*

An insane delusion is a spontaneous conception and acceptance as a fact of that which has no real existence except in the imagination and the persistent adherence to it against all evidence;[2] a belief in the existence of supposed facts in which no rational person would believe;[3] a conception originating spontaneously in the mind without evidence of any kind to support it which can be accounted for on no reasonable hypothesis, having no foundation in reality and springing from disease or a morbid condition of the mind;[4] a belief in things impossible, or in things so improbable under the surrounding circumstances that no person of sound mind would give them credit.[5] Whenever a person believes something extravagant to exist against all evidence, which has no existence in fact except in his own imagination, and he is incapable of being permanently reasoned out of the existence of such conception, he has an insane delusion which will invalidate a will affected by such extravagant belief,[6] however logically he may conduct himself upon the assumption of its existence.[7]

[1] Eggers v. Eggers, 57 Ind. 461.

[2] Smith v. Smith, 48 N. J. Eq. 566; Rush v. Megee, 36 Ind. 69; Waring v. Waring, 12 Jur. 947; Middleditch v. Williams, 45 N. J. Eq. 726, 4 L. R. A. 738.

[3] Re Forman, 54 Barb. 274; Prather v. McClelland, 76 Tex. 574; Vance v. Upson, 66 Tex. 476; Taylor v. Trich, 165 Pa. 586.

[4] Potter v. Jones, 20 Or. 239, 12 L. R. A. 161; Middleditch v. Williams, 45 N. J. Eq. 726, 4 L. R. A. 738.

[5] Prinsep v. Dyce, Sombre, 10 Moore, P. C. 232; Riggs v. American Home Missionary Soc. 35 Hun, 656.

[6] Mullins v. Cottrell, 41 Miss. 291; Benoist v. Murrin, 58 Mo. 307; Middleditch v. Williams, 45 N. J. Eq. 726, 4 L. R. A. 738; American Seamen's Friend Soc. v. Hopper, 33 N. Y. 619; Re Keeler's Will, 12 N. Y. S. R. 148; Re White, 121 N. Y. 406; Re Henry's Will, 18 Misc. 149; Stanton v. Wetherwax, 16 Barb. 259; Re Shaw's Will, 2 Redf. 107; Philadelphia Trust & S. D. Co. v. Drinkhouse, 17 Phila. 23; Boughton v. Knight, L. R. 3 Prob. & Div. 64; Dew v. Clark, 3 Add. Eccl. Rep. 79.

[7] American Seamen's Friend Soc. v. Hopper, 33 N. Y. 619; Re White, 121 N. Y. 406; Re Shaw's Will, 2 Redf. 107; Potter v. Jones, 20 Or. 239, 12 L. R. A. 161.

For Dr. Clevenger's treatment of the subject, see *Delusions*, chap. VIII.

§ 17. *Effect on testamentary capacity.*

The rule that to invalidate a will there must be want of capacity which prevents the testator from reasoning correctly and from understanding the relation of cause and effect in ordinary business affairs is directed to insanity and testamentary capacity as a general question, and does not apply to morbid or insane delusions in the mind of the testator or to reasoning on his part from facts and premises which exist only in a disordered imagination.[1] Where a will is claimed to be invalid because of an insane delusion the mental capacity of the testator is to be measured by the relation of the delusion to the testamentary act.[2] The true inquiry is whether the will was the result of an insane delusion,[3]— whether the testator was the victim of such a delusion as controlled his actions and rendered him insensible to the ties of blood and kindred.[4] Opinions and delusions entertained by him do not affect the validity of his will, unless they have unsettled his mind and controlled the disposition of his property.[5] And the sanity of a testator laboring under an insane delusion is to be tested by directing his attention to the subject-matter of such delusion.[6] Thus, a testamentary act which is shown to be the product of a delusion over which it exercised a controlling influence will be declared invalid though the testator was sane in all other respects.[7] The fact that a testator is capable of transacting complicated and

[1] American Bible Soc. v. Price, 115 Ill. 623; Re Brinton's Estate, 13 Phila. 234.

[2] Re Vedder, 6 Dem. 92.

[3] Re Keeler's Will, 12 N. Y. S. R. 148; Tawney v. Long, 76 Pa. 106.

[4] McClary v. Stull, 44 Neb. 175. And see Roe v. Taylor, 45 Ill. 485; Whitney v. Twombly, 136 Mass. 145; Prather v. McClelland, 76 Tex. 574; Vance v. Upson, 66 Tex. 476; Ballantine v. Proudfoot, 62 Wis. 216; Banks v. Goodfellow, 22 L. T. N. S. 820.

[5] Taylor v. Trich, 165 Pa. 586; Shreiner v. Shreiner, 178 Pa. 57; Re Henry's Will, 18 Misc. 149.

[6] Nichols v. Binns, 1 Swab. & T. 239.

[7] Florey v. Florey, 24 Ala. 241; Lucas v. Parsons, 24 Ga. 640, 71 Am. Dec. 147; American Bible Soc. v. Price, 115 Ill. 623; Rush v. Megee, 36 Ind. 69; Townshend v. Townshend, 7 Gill, 10; Riggs v. American Tract Soc. 95 N. Y. 503; Stanton v. Wetherwax, 16 Barb. 259; Re Gannon's Will, 3 Misc. 329; Thomas v. Carter, 170 Pa. 272; Tawney v. Long, 76 Pa. 106; Philadelphia Trust & S. D. Co. v. Drinkhouse, 17 Phila. 23; Re Drinkhouse's Estate, 14 Phila. 291; Re Brinton's Estate, 13 Phila. 234.

important business involving the exercise of considerable power of intellect does not negative the existence of delusions which would unfit him to make a will.[1] When it is ascertained that a will is the offspring of an insane delusion it should be declared void without inquiring what the testator would or would not have done if he had been of sound mind.[2] And a special verdict that a testator was of unsound mind when he made his will, and that he failed to make provisions for designated persons by reason of an insane delusion, is sufficient to sustain an order avoiding the probate where it was supported by evidence.[3]

The mere existence of a delusion, however, is not sufficient to invalidate a will; its connection with the will must be made manifest and shown to have influenced its provisions.[4] An insane delusion on the part of a testator will not affect the validity of his will where it was in no way connected with the subject or objects of the testamentary act.[5] And in such case an omission to call the attention of the jury to the delusion will not affect the verdict.[6] Nor will an insane delusion affect the validity of a will where it did not enter into the making of it and influence the dispositions made,[7] or where the peculiar views of the testator were not such as to prevent the exercise of a rational judgment touching the disposition of his property,[8] as in case of a delusion as to the possession of a large amount of property,[9] or that the services of the testator were re-

[1] Smee v. Smee, L. R. 5 Prob. Div. 84; Banks v. Goodfellow, 22 L. T. N. S. 820; Morse v. Scott, 4 Dem. 507.

[2] Cotton v. Ulmer, 45 Ala. 378, 6 Am. Rep. 706.

[3] Re Carpenter's Estate, 94 Cal. 406.

[4] Potter v. Jones, 20 Or. 239, 12 L. R. A. 161.

[5] Potter v. McAlpine, 3 Dem. 108; Re Frieke, 47 N. Y. S. R. 10; Kingsbury v. Whitaker, 32 La. Ann. 1055, 36 Am. Rep. 278; Boardman v. Woodman, 47 N. H. 120; Hollinger v. Syms, 37 N. J. Eq. 221; Lucas v. Parsons, 24 Ga. 640, 71 Am. Dec. 147; Puryear v. Reese, 6 Coldw. 21; Jones v. Goodrich, 5 Moore, P. C. 16; Smee v. Smee, L. R. 5 Prob. Div. 84; Banks v. Goodfellow, 22 L. T. N. S. 820.

[6] Banks v. Goodfellow, 22 L. T. N. S. 820.

[7] Murfett v. Smith, L. R. 1 Prob. Div. 116; Middleditch v. Williams, 45 N. J. Eq. 726, 4 L. R. A. 738; Potter v. Jones, 20 Or. 239, 12 L. R. A. 161; Brace v. Black, 125 Ill. 33.

[8] McClary v. Stull, 44 Neb. 175; Schneider v. Manning, 121 Ill. 376.

[9] Re Berrien, 24 N. Y. S. R. 332.

quired by the government, and that he was likely to be appointed to office.[1] And a will should not be set aside because the testator was subject to delusions, where it is manifest that the delusions did not affect its provisions.[2] So, a testator may make a valid will though he has delusions remaining in his mind at the time which are latent but capable of being revived and produced at any moment if anything should occur to bring his thoughts to the subject.[3]

A delusion which will invalidate a will must not only appear to have been the inducing cause to it, but it must also be shown to have existed at the time it was made.[4] But a jury would not generally be justified in coming to the conclusion that a delusion calculated to influence the testator in making his will was latent at the time so as to leave the testator free from any influence arising from it.[5] A delusion resulting from disease which was intermittent, where there were times when the testator was rational, will not invalidate his will where it does not appear that he labored under any delusion at any time in respect to any person who would otherwise probably be the object of his bounty.[6] And an instruction with reference to an insane delusion which ignores the contingency that the delusion might be found to have wholly or permanently disappeared before the will was made, in which case it should not be regarded with distrust, is erroneous.[7]

§ 18. *What delusions destroy capacity.*

A delusion which will invalidate a will must be such as to amount to an insane delusion.[8] Mere absurd opinions, however unfounded, are not insane delusions.[9] There must be something more than a mere mistaken notion on the part of the testator as

[1] Rice v. Rice, 53 Mich. 432.

[2] Rice v. Rice, 50 Mich. 448, 53 Mich. 432; Thompson v. Thompson, 21 Barb. 107; Dunham's Appeal, 27 Conn. 192.

[3] Ingoldsby v. Ingoldsby, 20 Grant, Ch. 131.

[4] Philadelphia Trust & S. D. Co. v. Drinkhouse, 17 Phila. 23.

[5] Banks v. Goodfellow, 22 L. T. N. S. 820.

[6] Lee v. Scudder, 31 N. J. Eq. 634.

[7] Manley v. Staples, 65 Vt. 370.

[8] Robinson v. Adams, 62 Me. 369, 16 Am. Rep. 473; Turner v. Rusk, 53 Md. 65; Burkhart v. Gladish, 123 Ind. 338; Fulleck v. Allinson, 3 Hagg. Eccl. Rep. 527.

[9] Ditchburn v. Fearn, 6 Jur. 201; Re White, 121 N. Y. 406.

to the feelings, intentions, or behavior of his relatives with reference to himself or his property,[1] where there is nothing irrational about it and no proof that evidence was ever presented to him tending to show that he was mistaken in respect to it,[2] or that it could not have been changed by evidence.[3] And a mistaken notion on the part of a wife that her husband intended to convert her separate estate to his own use, under the influence of which she excluded him from participation in her property, does not invalidate her will.[4] Nor does a mistaken notion as to the disease with which he was afflicted.[5] And the fact that a testator entertains animosity, cherishes prejudices, and nourishes his wrath against his heirs at law, and is guided and controlled by his prejudices in the disposition of his property, does not *per se* destroy his testamentary capacity, though such prejudices may have been unfounded.[6] So, where a testator has actual ground for supposition as to the existence of something in which he believes, though in fact not well founded and disbelieved by others, the misapprehension of the fact is not an insane delusion which will invalidate his will,[7] though it may be erroneous and unjust and even cruel and unnatural,[8] and though he may have been influenced to exclude persons from sharing in his bounty who would not have otherwise been excluded.[9]

Where the beliefs or aversions of a testator concerning a person who might have been a beneficiary under his will were formed from an apparent cause leading on his part to an unjust and erroneous view, it shows an unfortunate error of judgment or want of reasoning power, but not an absolute want of intellect on the subject, or that his conclusions were formed without

[1] Hall v. Hall, 38 Ala. 131; Re Carpenter's Estate, 94 Cal. 406; Re Tracy, 11 N. Y. S. R. 103; Re Keeler, 3 N. Y. Supp. 629.

[2] Re Tracy, 11 N. Y. S. R. 103; Coit v. Patchen, 77 N. Y. 533.

[3] Bull v. Wheeler, 6 Dem. 123.

[4] Mosser v. Mosser, 32 Ala. 551.

[5] Re Storey's Will, 20 Ill. App. 183.

[6] Carter v. Dixon, 69 Ga. 82.

[7] Stackhouse v. Horton, 15 N. J. Eq. 202.

[8] Mullins v. Cottrell, 41 Miss. 291.

[9] Martin v. Thayer, 37 W. Va. 38.

foundation in fact.[1] Thus, an opinion on the part of a testator that one who might have been a beneficiary under his will had poisoned his dog is not an insane delusion which will invalidate his will where it was based on rational grounds and shared by others.[2] And an erroneous opinion of the testatrix, otherwise competent, as to the conduct and affections of her husband and some of her children, is not an insane delusion which will affect her will, where she and her husband frequently quarreled and a son had committed an assault upon her;[3] nor is an opinion entertained by a testatrix that she was morally indebted to a favorite daughter for protection and support, where controversies had existed in the family for years and the daughter had taken an active part with her mother;[4] or a belief upon the part of a testator that his children had deeply wronged him and testified falsely against him and were trying to rob him of his property, in consequence of which he disinherits them, where most of the disinherited children were witnesses in a divorce case brought by his wife against him, and the facts led him to believe that they were all opposed to him.[5] The test question is, Could any man in the possession of his senses believe in such a state of facts?[6] And to invalidate a will it must appear that the testator was subject to a delusion as to facts within his own observation in the existence of which he actually believed, which a rational man from the use of his senses under the same circumstances would have known not to exist.[7] The delusion must be one not only founded in error, but also without evidence of its truth or its existence, against the clearest evidence to the contrary;[8] and it is not established where the court is able to understand how a person so situated might believe in its truth and still be in the posses-

[1] Potter v. Jones, 20 Or. 239, 12 L. R. A. 161; Re Keeler, 3 N. Y. Supp. 629.

[2] Fulleck v. Allinson, 3 Hagg. Eccl. Rep. 527.

[3] Coit v. Patchen, 77 N. Y. 533. And see Re Blakely's Will, 48 Wis. 294.

[4] Coit v. Patchen, 77 N. Y. 533.

[5] Re Cline's Will, 24 Or. 175.

[6] Boughton v. Knight, L. R. 3 Prob. & Div. 64.

[7] Ditchburn v. Fearn, 6 Jur. 201.

[8] Potter v. McAlpine, 3 Dem. 108; Merrill v. Rolston, 5 Redf. 220. See also Greenwood's Case, 1 Add. Eccl. Rep. 279, note.

sion of his senses.[1] It is not sufficient to show that the belief was not well founded, or that it was based on slight and inadequate evidence.[2] It is of the essence of an insane delusion that it has no basis in reason, and cannot be dispelled by reason, and is thus capable of being cherished side by side with other ideas with which it is rationally inconsistent.[3] And while the nonexistence of the facts believed should be put in doubt the jury may find an insane delusion where the testator believed what could not possibly be true, though no positive or direct evidence could be offered to show the falsity of the belief.[4] Gross exaggeration of slight instances, however, may amount to a delusion as to facts, and be an insane delusion.[5] And a belief in something which no sane person would believe in is unequivocal evidence of insanity, though there might be a shadow of evidence that the facts existed.[6]

§ 19. *Delusions as to the person affected.*

The general rule is that an insane delusion relating to persons who would naturally be the objects of the testamentary bounty of the person entertaining it, and which affects or may have affected the provisions of his will, is sufficient to invalidate it.[7] Thus, a will is invalidated by an insane delusion upon the part of the testator that his children were his enemies and were combined against him to rob him of his property, where it led him to disinherit them;[8] and by a mistaken impression that a niece, who was the testator's only next of kin, had wilfully occasioned the death of his sister and made an attempt upon his own life in order to get possession of his property;[9] and by a delusion that

[1] Phillips v. Chater, 1 Dem. 533.

[2] Clapp v. Fullerton, 34 N. Y. 190, 90 Am. Dec. 681.

[3] Smith v. Tebbitt, L. R. 1 Prob. & Div. 401.

[4] Robinson v. Adams, 62 Me. 369, 16 Am. Rep. 473.

[5] Ditchburn v. Fearn, 6 Jur. 201.

[6] Riggs v. American Home Missionary Soc. 35 Hun, 656.

[7] American Bible Soc. v. Price, 115 Ill. 623; Johnson v. Moore, 1 Litt. 372; American Seamen's Friend Soc. v. Hopper, 33 N. Y. 619; Re Keeler's Will, 12 N. Y. S. R. 148; Re Shaw's Will, 2 Redf. 107; Thomas v. Carter, 170 Pa. 272; Leech v. Leech, 5 Clark (Pa.) 86; Chaney v. Bryan, 16 Lea, 63; Dew v. Clark, 3 Add. Eccl. Rep. 79; Dew v. Clark, 5 Russ. Ch. 163.

[8] Morse v. Scott, 4 Dem. 507.

[9] Fowlis v. Davidson, 6 Notes of Cases, 461.

the testator's father and sister, who were his only heirs at law, hated him because of a difference in religious belief, and that the father had driven him from home, refusing him the means of getting an education, and wanted to get him out of the way to get his property.[1] So, a will is rendered wholly inoperative by a groundless opinion on the part of the testator that his youngest child was illegitimate, which his friends are unable to change, in consequence of which he refuses to make any provision for it.[2] And a belief by a testator that the Masons intended to kill and rob him, and that his two brothers, who were his next of kin, were connected with them, is sufficient to invalidate his will.[3] And a delusion out of which the testator refuses to be reasoned, that relatives for whom he would have naturally provided are impostors and his enemies, and not related to him, and are trying to get his property, is sufficient to invalidate his will.[4] Nor will a will be permitted to stand where the testatrix labored under the mistaken idea that her only living daughter and her daughter's husband had illtreated her and purposely made her uncomfortable, and permitted their children to annoy her, and attempted to poison her,[5] or where a testator entertains a delusion that his wife and children were conspiring against him and had persecuted him, and had incited others to do so, and attempted to poison him and send him to a lunatic asylum, pursuant to which he partially disinherits them;[6] or where he entertains a delusion that they have conspired to break up his family and destroy his authority and injure him personally and in reputation and property, and to poison him, and that they are therefore not proper recipients of any of his estate.[7] And a delusion without foundation, that the testator's daughter was an inmate of a house of ill-fame, will invalidate a will disinheriting her, though he was entirely sane upon other subjects.[8] Prejudices on the part of a

[1] Colhoun v. Jones, 2 Redf. 34.
[2] Bell v. Lee, 28 Grant, Ch. 439.
[3] Lathrop v. Borden, 5 Hun, 560.
[4] Re Shaw's Will, 2 Redf. 107.
[5] Ballantine v. Proudfoot, 62 Wis. 216.
[6] Re Kahn, 1 Connoly, 510.
[7] Riggs v. American Tract Soc. 95 N. Y. 503.
[8] Rivard v. Rivard (Mich.) 2 Det. L. N. 1003.

testator, however, against one who is the natural object of his bounty, though upon improper grounds, are not sufficient to invalidate a will if they were such as might reside in a sound mind;[1] nor will a delusion that his children had treated him badly.[2] And a delusion with respect to his nieces and nephews, who would naturally have been the objects of his testamentary bounty, will not invalidate his will where it cannot be seen that its testamentary provisions were affected by it.[3] Nor will an insane delusion on the part of a testator as to his sons in law invalidate his will where he did not permit it to affect his judgment as to the members of his own family.[4] Nor will a will be set aside on the ground that the testator entertained a delusion as to his brothers and nephews and nieces which prevented him from giving them anything, where he had a wife living to whom he was greatly attached, as it will be inferred that he acted from a sense of justice towards her rather than from a delusion towards them.[5]

So, the belief, or pretended belief, on the part of a testator in the illegitimacy of a child whom he disinherited will not be deemed an insane delusion which will invalidate his will where he had acknowledged her legitimacy, and it appears that the doubts thrown upon it were for sinister purposes of his own.[6]

§ 20. *Speculative beliefs.*

Opinions upon questions of mere speculative belief cannot be considered as delusions or insanity.[7] And an opinion entertained by a testator as to a future state, concerning which no one has positive knowledge and which is entirely within the dominion of opinion and faith and not of knowledge, cannot be deemed evidence of insanity which will affect the validity of his will.[8] Nor is a belief in religious creeds or in the doctrine of any church

[1] Greenwood v. Greenwood, 3 Curt. Eccl. Rep. 337.

[2] Hite v. Sims, 94 Ind. 333.

[3] Re McCue, 17 N. Y. Week. Dig. 501.

[4] Rush v. Megee, 36 Ind. 69. And see Brace v. Black, 125 Ill. 33.

[5] Re Keeler, 3 N. Y. Supp. 629.

[6] Ditchburn v. Fearn, 6 Jur. 201.

[7] Thompson v. Quimby, 2 Bradf. 449. And see Thompson v. Thompson, 21 Barb. 107; Smith's Will, 52 Wis. 543, 38 Am. Rep. 756; Walcott v. Allyn, Milw. Eccl. Rep. 65.

[8] Re Bonard's Will, 16 Abb. Pr. N. S. 128; Gass v. Gass, 3 Humph. 278.

such an insane delusion as will invalidate a will.[1] And the belief of a testator that there are degrees of happiness in a future state of existence, and that in whatever circle a man lived on earth, he may live in the same in a future state, and that his pre-eminence there depends upon the amount of property he possessed here and the charitable purposes to which he devoted it does not establish his insanity.[2] Nor is belief in the doctrine of metempsychosis, consisting of a belief that the souls of men after death pass into animals, an insane delusion which will invalidate the will of a person so believing.[4] So, religious impressions and apprehensions producing extreme anxiety and hopeless despair because of a conviction upon the part of a testator that he had passed his day of grace, which rendered him unconcerned and listless on all other subjects, do not show him incapable of making a valid will, where his attention could be diverted to other things and he was rational and sensible as to them.[4] But the modification of an instruction that eccentricities or peculiarities or radical or extreme notions or opinions upon religion, education, or secret societies will not render a man incapable of making a will, so as to read "not necessarily render him incapable," is not error.[5]

A belief in the possibility of cures as the result of the exercise of faith on the part of the patient or healer or both however, though practically held by many persons, is sufficient to constitute testamentary incapacity where it unsettles the judgment and leaves the testator under the influence of a delusion that usurps the place of reason and controls his will.[6]

So, a belief in spiritualism is not mental unsoundness or an insane delusion which will affect the validity of a will,[7] unless it

[1] Newton v. Carbery, 5 Cranch, C. C. 626; Gass v. Gass, 3 Humph. 278; Mullins v. Cottrell, 41 Miss. 291.

[2] Gass v. Gass, 3 Humph. 278.

[3] Re Bonard's Will, 16 Abb. Pr. N. S. 128.

[4] Re Weir's Will, 9 Dana, 434.

[5] American Bible Soc. v. Price, 115 Ill. 632.

[6] Taylor v. Trich, 165 Pa. 586.

[7] La Bau v. Vanderbilt, 3 Redf. 385; Re Keller's Will, 12 N. Y. S. R. 148; Re Spencer's Estate, 96 Cal. 448; Otto v. Doty, 61 Iowa, 23; Middleditch v. Williams, 45 N. J. Eq. 726, 4 L. R. A. 738; Turner v. Hand, 3 Wall. Jr. 120.

appears that the will was the offspring of such belief.[1] Thus, a belief by a testator that he can communicate with spirits and be advised and directed by them in his business transactions and as to the disposition of his property does not *per se* establish his testamentary incapacity.[2] And the fact that he may be led to give credence to alleged communications from spirits which are in fact impositions and delusions contrived by designing persons does not establish testamentary incapacity, but is proper to be considered on the question of mental weakness.[3] So, mere eccentricities of belief, including a belief in spiritualism, are not conclusive evidence of want of testamentary capacity where the testator is not affected by any delusion respecting matters of fact connected with the will or objects of his bounty.[4] And belief by a testator in mesmerism, clairvoyants, divining and mineral rods, and dreams and spiritual influences, and in the existence of deposits of money by Captain Kidd, ascribing his failure to find them to the utterance of certain words during the search, is not such an insane delusion as will invalidate his will.[5]

An insane delusion may be established in a particular case, however, by the surrender of the will of a victim to imaginary directions regarded as the directions of God or spirits speaking to him from another world, or by the control of an impulse due to an imaginary state of facts,[6] and a will in favor of a spiritual medium, made by one who embraced spiritualism as practised by her instead of believing in it as an abstract proposition, becoming possessed by it and suffering it to dominate his life and override every other consideration, which belief was artfully used by the medium to alienate him from his only child and get his property, will be set aside.[7] And belief on the part of a testatrix that the spirit of her deceased husband directed or dictated her will, and groundless, causeless suspicions entertained by her of her son-in-law's character, will invalidate her will where they amount to an insane delusion and

[1] La Bau v. Vanderbilt, 3 Redf. 384.
[2] Turner v. Rusk, 53 Md. 65.
[3] Re Storey's Will, 20 Ill. App. 183.
[4] McClary v. Stull, 44 Neb. 175; Re Smith, 52 Wis. 543.
[5] Thompson v. Quimby, 2 Brndf. 449.
[6] Taylor v. Trich, 165 Pa. 586.
[7] Thompson v. Hawks, 14 Fed. Rep. 902.

influence her in making her will.[1] So, belief in witchcraft, on the part of a testator, will not invalidate his will where it is not shown to have had some connection with such belief,[2] though connected with a belief that his health had been permanently affected by slow poisoning surreptitiously administered,[3] or that his daughter, whom he disinherited, was a witch,[4] or accompanied by extravagant and eccentric actions.[5] And belief in the statement of clairvoyants, fortune tellers, and spiritual mediums, and in the impressions derived from dreams, and in witchcraft, together with wild and visionary ideas not connected with the subject or object of the testamentary act, will not invalidate a will where the testator readily abandoned his opinions when they were demonstrated to be incorrect, and his judgment was sound as to matters of business.[6]

§ 21. *Moral insanity.*

Moral insanity is a disorder of the moral affections, feelings, and propensities.[7] It may or may not impair the intellect.[8] Unless accompanied by insane delusions it will not be sufficient to invalidate a will or to incapacitate a person to make one.[9] And the fact that a wife distrusted, despised, hated, and feared her husband without reason, and that her will was probably influenced by her feelings towards him, will not invalidate a will made by her excluding him in a large measure from sharing in her property.[10] In such case the question is not whether her feelings towards him were unreasonable or unjust, or whether they

[1] Robinson v. Adams, 62 Me. 369, 16 Am. Rep. 473.

[2] Leech v. Leech, 5 Clark (Pa.) 86; Lee v. Lee, 4 McCord, L. 183, 17 Am. Dec. 722; Jones v. Hughes, 15 Abb. N. C. 141.

[3] Leech v. Leech, 5 Clark (Pa.) 86.

[4] Schlidnecht v. Rompf, 9 Ky. L. Rep. 121; Addington v. Wilson, 5 Ind. 137, 61 Am. Dec. 81.

[5] Lee v. Lee, 4 McCord L. 183, 17 Am. Rep. 722.

[6] Re Chafin's Will, 32 Wis. 557.

The insane are more apt to entertain strange beliefs, and to be influenced and defrauded by alleged spiritualists, clairvoyants, etc., than are sane persons. See *Spiritualism*. S. V. C.

[7] Re Forman, 54 Barb. 274; Boardman v. Woodman, 47 N. H. 120.

[8] Re Forman, 54 Barb. 274. And see Mayo v. Jones, 78 N. C. 402.

[9] Boardman v. Woodman, 47 N. H. 120.

[10] Re Forman, 54 Barb. 274; Frere v. Peacock, 1 Rob. 442.

showed moral insanity as to him, but whether such feelings were insane.[1] And the question as to the extent to which moral debasement is evidence of insanity is one for the jury.[2]

§ 22. *Incapacity in connection with undue influence or fraud.*

An objection in a will contest that the testator was under undue influence and restraint at the time of making his will implies that he had sufficient mental capacity to make it.[3] But weakness of mind, whether arising from age, infirmity, or other causes, though not sufficient to create testamentary incapacity, may nevertheless form favorable conditions for the exercise of undue influence, and the condition of the mind may be a proper subject of inquiry on such an issue.[4] And in determining whether a will was the result of undue influence or fraud it is proper to consider the physical and mental condition of the testator,[5] as this is commonly the condition of undue influence.[6] And where there is evidence of undue influence when the question of capacity is at issue the jury should be left free to consider it.[7] It requires less undue influence and less fraud to procure a will unlawfully from a person of weak and impaired intellect than from a person of full mental vigor,[8] and proof of much less capacity is sufficient to sustain a will of an officious character procured through unsuspected agencies than is necessary to sustain one of the opposite description.[9] And the questions of undue influence and of mental incapacity should not be separated where the testator was of advanced age and suffered from a disease affecting his brain and vital powers.[10] The weakness of mind, however, which will affect the

[1] Re Forman, 54 Barb. 274.

[2] Mayo v. Jones, 78 N. C. 402.

For Dr. Clevenger's discussion on this subject, see *Moral Insanity*, chap. VIII.

[3] Kinne v. Johnson, 60 Barb. 69.

[4] Herster v. Herster, 122 Pa. 239. And see Wilson v. Mitchell, 101 Pa. 495.

[5] Myers v. Hauger, 98 Mo. 433; Reichenbach v. Ruddach, 127 Pa. 564.

[6] Hoban v. Campau, 52 Mich. 346.

[7] Tobin v. Jenkins, 29 Ark. 151; Re Armor's Estate, 154 Pa. 517.

[8] Reichenbach v. Ruddach, 127 Pa. 564.

[9] Brogden v. Brown, 2 Add. Eccl. Rep. 441.

[10] Wilson's Appeal, 11 W. N. C. 333; Gibson's Estate, 11 W. N. C. 355; Sherley v. Sherley, 81 Ky. 240. And see Re Armor's Estate, 154 Pa. 517.

validity of a will in connection with undue influence must be such as to render the testator incapable of resisting the influence used,[1] and to render him incapable of seeing and understanding as he would do if he were unaffected.[2] Undue influence cannot exist unless there is a person incapable of protecting himself, as well as a wrongdoer to be resisted.[3] And a testamentary disposition of a person of imbecile mind, which is induced by fraud, imposition, or undue influence, so as to be different from what it would have been had the testator been in the full possession of his faculties, will be set aside.[4] A person over whose mind such a domination or influence is obtained as to prevent him from exercising his discretion in the making of his will cannot be considered as having a disposing mind so as to entitle him to make it, though his mind was of sufficient soundness and discretion to regulate his affairs in general.[5]

§ 23. *Testamentary capacity; how determined.*

What degree of mental capacity is necessary to enable a testator to make a will, and to what extent and to what degree of perfection he must understand the will and the persons and property affected by it, and to what extent his mind must have been impaired to render him incapable, are questions of law exclusively for the court.[6] Whether unsoundness of mind amounts to judicial incapacity to make a will is to be ascertained by the court by the application of rules of law in the exercise of a sound discretion regulated thereby.[7] And the sufficiency of evidence adduced to show testamentary capacity is likewise a question for the court, and the submission of the question of capacity to the jury is error

[1] Sutton v. Sutton, 5 Harr. (Del.) 459; Baldwin v. Parker, 99 Mass. 79, 96 Am. Dec. 697; Children's Aid Soc. v. Loveridge, 70 N. Y. 387; Kinleside v. Harrison, 2 Philm. Eccl. Rep. 551.

[2] Floyd v. Floyd, 3 Strobh. L. 44, 49 Am. Dec. 626.

[3] Latham v. Udell, 38 Mich. 238.

[4] Clark v. Fisher, 1 Paige, 171, 19 Am. Dec. 402.

[5] Mountain v. Bennet, 1 Cox, Ch. Cas. 356.

For Dr. Clevenger's discussion on this subject, see *Undue Influence*, chap. VIII.

[6] Kempsey v. McGinniss, 21 Mich. 123; Overton v. Overton, 18 B. Mon. 61.

[7] Stackhouse v. Horton, 15 N. J. Eq. 202.

unless it finds the evidence to be sufficient.[1] And the jury have nothing to do with distinction and classification as to unsoundness of mind, except as they may assist them in arriving at a conclusion as to its existence.[2] So, the question as to what constitutes an unreasonable and irrational bias on the part of the testator is one for the court, and an instruction which in effect leaves the question to the jury is erroneous.[3] Whether a testator had the degree of mental capacity necessary to enable him to make a valid will, however, is a question of fact for the decision of the jury upon all the circumstances of the particular case,[4] a finding of soundness of mind not being a conclusion of law but the finding of an ultimate fact.[5] And the reasonableness or unreasonableness of the dispositions of a will is also a question for their consideration,[6] and the question with relation to undue influence over a testator in respect to the execution of his will, in connection with mental incapacity, is also one of fact to be determined by the trial court.[7]

So, what constitutes an insane delusion, and its effect upon testamentary capacity, are questions of law.[8] But the question whether or not the testator comes within the legal definition of a delusion is one of fact to be found by the jury from the evidence.[9] And whether prejudice against a natural object of a testator's bounty is evidence of derangement of mind or not

[1] Shaver v. McCarthy, 110 Pa. 339; Shailer v. Bumstead, 99 Mass. 112.

[2] Lowder v. Lowder, 58 Ind. 538.

[3] Williams v. Williams, 90 Ky. 28.

[4] Campbell v. Campbell, 130 Ill. 466, 6 L. R. A. 167; Meeker v. Meeker, 75 Ill. 260; Hill v. Nash, 41 Me. 585, 66 Am. Dec. 266; Ware v. Ware, 8 Me. 42; Re Coleman, 111 N. Y. 220; Chrisman v. Chrisman, 16 Or. 127; Rees v. Stille, 38 Pa. 138; Lewis v. Lewis, 6 Serg. & R. 496; Tillman v. Hatcher, 1 Rice, L. 271; Gass v. Gass, 3 Humph. 278; Vance v. Upson, 66 Tex. 476; Prather v. McClelland, 76 Tex. 574; Minard v. Minard, 1 Brayton, 231; Den, Stevens, v. Vancleve, 4 Wash. C. C. 262.

[5] Clements v. McGinn (Cal.) 33 Pac. 920.

[6] Evans v. Arnold, 52 Ga. 169; Re Carpenter, 79 Cal. 382.

[7] Re Coleman, 111 N. Y. 220; Robinson v. Adams, 62 Me. 369, 16 Am. Rep. 473; Prather v. McClelland, 76 Tex. 578.

[8] Prather v. McClelland, 76 Tex. 574.

[9] Prather v. McClelland, 76 Tex. 574; Robinson v. Adams, 62 Me. 369, 16 Am. Rep. 473; Banks v. Goodfellow, 22 L. T. N. S. 820.

is also a question for the jury.[1] The court will not declare, as matter of law, that certain facts and matters are not of themselves insane delusions rendering a will invalid, but will require the jury to determine after a full and fair consideration of the evidence whether or not the facts proved show the existence of such a delusion.[2]

And the fact that proof of delusion is all upon one side does not authorize the court to direct the jury to find in accordance with such proof, as the jury have the right to discredit it.[3] So, where there are no facts showing that the testator was afflicted with what in law amounts to an insane delusion the issue should be taken from the jury,[4] and where a will is contested upon the ground of a special delusion against the contestant the attention of the jury ought to be called specially to that issue.[5] But the court will not separate certain supposed delusions from a large bulk of evidence and instruct that they alone are sufficient to show insanity.[6]

So it is for the jury, and not for the judge, to determine as to the weight of any particular proof.[7] And the weight and value of the opinions of both expert and nonexpert witnesses as to mental capacity are for the consideration of the jury.[8] And an instruction that one clause or item of evidence is of greater weight than another is erroneous as an invasion of the province of the jury.[9] Nor is it proper in instructing the jury to group a set of facts together or single out particular facts and either condemn them or exalt them as conclusive, as the jury should be left to weigh the facts.[10] And an instruction in a contest in which undue

[1] Greenwood v. Greenwood, 3 Curt. Eccl. Rep. 337.

[2] Robinson v. Adams, 62 Me. 369, 16 Am. Rep. 473.

[3] Townshend v. Townshend, 7 Gill, 10.

[4] Prather v. McClelland, 76 Tex. 574.

[5] Lucas v. Parsons, 24 Ga. 640, 71 Am. Dec. 147.

[6] Turner v. Rusk, 53 Md. 65.

[7] Gardner v. Lamback, 47 Ga. 133; Trezevant v. Rains, 85 Tex. 329.

[8] Wise v. Foote, 81 Ky. 10; Newhard v. Yundt, 132 Pa. 324.

[9] Brown v. Riggin, 94 Ill. 560; Durham v. Smith, 120 Ind. 463; Shaver v. McCarthy, 110 Pa. 339; Cline v. Lindsey, 110 Ind. 337; Gardner v. Lamback, 47 Ga. 133.

[10] Hoerth v. Zable, 92 Ky. 202; Zimlich v. Zimlich, 12 Ky. L. Rep. 590; Howard v. Coke, 7 B. Mon. 655; Jenkins v. Tobin, 31 Ark. 306; Spoonemore v. Cables, 66 Mo. 579; Reichenbach v. Ruddach, 127 Pa. 564.

influence is alleged, that if the jury believes the testator was of sound mind and knew the contents of the will it will be sustained, is error, unless so qualified as to leave the question of free will to the jury.[1]

So, the finding of a jury upon the question as to testamentary capacity is conclusive unless clearly against the weight of evidence.[2] And a verdict or finding either for or against the will will not be set aside on appeal where there is a conflict of evidence and no question of law is presented,[3] though the evidence to uphold it is meager and inconclusive.[4] Nor should a verdict be directed.[5] And a determination against a will will not be reversed, though the testimony in its favor preponderates, where the court cannot say that the finding was so palpably against the weight of evidence as to indicate passion and prejudice.[6] The question as to whether refusal to instruct the jury that there was not sufficient legal evidence before them of mental incapacity was error or not, will not be considered on appeal where the verdict was in favor of the proponent.[7]

So, in all cases in equity involving questions of insanity it is eminently proper that an issue should be framed and tried by a jury.[8] But the court has power to try the question without directing an issue,[9] and to set aside a verdict of a jury and grant a new trial if in its opinion the verdict ought not to be permitted to stand.[10] And a new trial will be granted on an appeal from a decree of probate tried on the issue of testamentary capacity where the verdict was manifestly against the weight of evidence, though there was evidence on both sides.[11] But where in a will contest

[1] Yardley v. Cuthbertson, 108 Pa. 395, 56 Am. Rep. 218.

[2] American Bible Soc. v. Price, 115 Ill. 623; Brown v. Bruce, 19 U. C. Q. B. 35.

[3] Rogers v. Diamond, 13 Ark. 475; Moyer v. Swygart, 125 Ill. 267; Smith v. James, 72 Iowa, 515; Tillman v. Hatcher, 1 Rice, L. 271; Hill v. Nash, 41 Me. 585, 66 Am. Dec. 266.

[4] McDaniel v. Crosby, 19 Ark. 533.

[5] Duggan v. McBreen, 78 Iowa, 591.

[6] Newcomb v. Newcomb, 16 Ky. L. Rep. 376; Brace v. Black, 125 Ill. 33.

[7] Moore v. McDonald, 68 Md. 321.

[8] Guild v. Hull, 127 Ill. 523; Myatt v. Walker, 44 Ill. 485.

[9] Alexander v. Alexander, 5 Ala. 517.

[10] McElroy v. McElroy, 5 Ala. 81.

[11] Kinne v. Kinne, 9 Conn. 102, 21 Am. Dec. 732.

opinions as to testamentary capacity are given both ways, and both sides are sustained, the determination of the surrogate who had the advantage of personal inspection of the witnesses will not be disturbed on appeal unless the preponderance is strongly against his finding.[1]

§ 24. *Submission of the issue.*

Under the Pennsylvania practice the question frequently arises whether there is sufficient evidence to warrant the submission of the question of testamentary capacity to a jury, and an issue should be granted where the evidence is such that if believed by the jury a verdict against the will would be sustained.[2] But if it would not justify finding a verdict against the will, or if such a verdict would be set aside as against the weight of evidence, it should be refused.[3] Doubtful and unsatisfactory evidence of incapacity will not warrant the submission of an issue;[4] nor will evidence which is insufficient to overcome the presumption of capacity.[5] Thus, the opinions of disappointed and insufficiently informed witnesses that a testator did not have testamentary capacity are not sufficient to warrant sending an issue to a jury where the overwhelming weight of the testimony as to facts shows testamentary capacity.[6] Nor is evidence of trifling acts indicating mental incapacity, and the testimony of a physician that the testatrix was a little peculiar and had symptoms of softening of the brain and was childish, where another physician with better opportunities for judging testified to the contrary, and the proof

[1] Harper v. Harper, 1 Thomp. & C. 351.

[2] Colgate's Estate, 5 W. N. C. 170; Re Schwilke's Appeal, 100 Pa. 628; Re Palmer's Estate, 24 W. N. C. 105.

[3] Re Lillibridge's Estate, 133 Pa. 211; Herster v. Herster, 122 Pa. 339; Re Knauss's Appeal, 114 Pa. 10; Re Eddey's Appeal, 109 Pa. 406; Re Combs's Appeal, 105 Pa. 155; Wilson v. Mitchell, 101 Pa. 495; Cauffman v. Long, 82 Pa. 72; Re De Haven's Appeal, 75 Pa. 337; Re Taylor's Estate, 16 Phila. 274; Re Newlin's Estate, 7 Pa. Co. Ct. 640; Re Loeser's Estate, 35 W. N. C. 43; Re Colgate's Estate, 5 W. N. C. 170; Re Frowert, 2 W. N. C. 588; Re Depuy, 1 W. N. C. 212.

[4] Re Foster's Estate, 142 Pa. 62; Re Schwilke's Appeal, 100 Pa. 628; Re Rowson's Estate, 4 Pa. Dist. R. 91, Affirmed in 175 Pa. 154.

[5] Re Hazzard's Estate, 7 Pa. Co. Ct. 56.

[6] Re Eddey's Appeal, 109 La. 406.

of testamentary capacity was overwhelming.[1] So, evidence that a testator was physically weak and sick will not warrant an issue where he had full knowledge of the act he was engaged in and of his property and the disposition he desired to make of it;[2] nor will evidence that he was old, intemperate, and irascible;[3] nor evidence of forgetfulness on the part of a testator, and that he complained that his head was giddy, as against evidence that he was intelligent and clear-headed and of a sound and disposing mind.[4] And evidence by visitors that they found the testator asleep, and that he seemed to be in a stupor and muttered incoherently, will not warrant the submission of an issue where he had taken chloral by order of his physician and the lawyer who wrote the will, and the attesting witnesses testify that he was in full possession of his faculties when he executed it.[5] But evidence that a testator had been in the habit of dosing himself with morphine, opium, and other drugs for years, and that he believed that his family were conspiring against him, and that if not watched his wife might poison him, justifies the submission of an issue to a jury where the will disinherited two of his daughters because of the marriage of one of them to a gentleman against whom he conceived a groundless antipathy, and of the presence of the other at the marriage ceremony.[6] So, evidence that a testator was blind and partially deaf, and his memory treacherous as to recent events, and that he would frequently repeat himself, and slept almost constantly and had become filthy in his habits, together with the opinion of several who had known him in the prime of life that he lacked testamentary capacity, is not sufficient to warrant the submission of the issue where his will was reasonable and somewhat similar to a previous disposition, which had been revoked.[7] And proof of mental vigor, business ability, and knowledge of his affairs, on the part of a testator, is sufficient

[1] Re Newlin's Estate, 7 Pa. Co. Ct. 648.

[2] Re Doyle's Estate, 7 Pa. Co. Ct. 657; Re McKim's Estate, 27 W. N. C. 110.

[3] Keating's Appeal, 36 Pittsb. L. J. 283.

[4] Re Depuy, 1 W. N. C. 212. And see Re Pensyl, 157 Pa. 465.

[5] Re Hamilton's Estate, 4 Pa. Dist. R. 161, 16 Pa. Co. Ct. 303.

[6] Re Carter's Estate, 11 Pa. Co. Ct. 140.

[7] Wilson v. Mitchell, 101 Pa. 495; Re Napfle's Estate, 134 Pa. 492.

to warrant a refusal to submit an issue as against evidence that he preferred one child above another in making his will, or disinherited one or more;[1] or as against evidence of bad health, slight insomnia, and occasional lapse of memory and absent-mindedness;[2] or as against evidence that he was confined to his bed with rheumatism during the last six years of his life and subject at intervals to delusions, imagining that people were carrying away his fences, where the delusions were of short duration;[3] or as against evidence of filthy habits and extreme vulgarity at times, and that the testator was penurious and miserly to the extent of depriving himself of the comforts of life.[4] But evidence that the testator was dirty in his personal habits, and had no memory, and could not feed himself nor tend to any business, and did not know the value of money, and could not distinguish between different amounts, and committed many strange and extravagant actions, is sufficient.[5] So, evidence of rambling conversations and instances of forgetfulness and absent-mindedness, profanity, abusiveness, and amorous remarks does not authorize an issue.[6] Nor does evidence of want of memory and ability to speak except in monosyllables, or to tell the time, and that he was avoided by his wife, and spoke of new shoes as coffins, where most of such defects were explained by proof that his eyesight was weak and his hand paralyzed and that he came from a certain place where certain shoes were called coffins.[7] Nor is an issue warranted by the fact that the testatrix, who was old and somewhat feeble, and whose sanity was questioned, gave her legal adviser, who had prepared her will, property amounting to one eighth of her whole estate, giving the residue to him in trust for certain of her relatives.[8] And an inquisition of lunacy finding a testator a lunatic at the time of the execution of his will, which was traversed, but the issue was not tried by reason of his

[1] Re Loeser's Estate, 3 Pa. Dist. R. 817.
[2] Re Douglass's Estate, 162 Pa. 567.
[3] Re Boyer's Estate, 166 Pa. 630.
[4] Re Tallman's Will, 1 Pa. Adv. R. 530.
[5] Re Ulmer's Appeal (Pa.) 11 Cent. 403.
[6] Re Fow's Estate, 147 Pa. 264.
[7] Re Gatley's Estate, 4 Pa. Dist. R. 52.
[8] Stokes v. Miller, 10 W. N. C. 241.

death, is not conclusive of the right to the submission of the issue to a jury.[1]

In England the validity of a will must be determined by a jury where the heir insists upon an issue, though all the witnesses to the will testify to the sanity of the testator.[2]

§ 25. *Proof to establish generally.*

To avoid a will on the ground of insanity of the testator general insanity must be made out or partial insanity at the very time of executing it.[3] The principal mode of testing the mental condition of a testator is by a review of his life, habits, and opinions,[4] and consideration of his answers to general questions and his recollection of past events and his reasoning in regard to them.[5] The point at which a disposing mind disappears and incapacity begins, however, is to be ascertained by an examination of the particular circumstances of each case, to be duly made and considered by the court or jury.[6]

The manner in which a will was written and executed, and the nature and extent of the estate of the testator, his family and connections, their condition and relative situation to him, the terms upon which he stood with them, the claims of particular individuals, the condition and relative situation of the legatees or devisees named, the situation of the testator himself, and the circumstances under which the will was made, often afford important evidence on the question of the testator's testamentary capacity.[7] The jury should be made acquainted as nearly as possible with the present condition of the testator in order that they may judge of it as they would do if they personally knew all about it.[8] In determining whether the testator's mental faculties had become so weakened as to render him incapable of making a valid will, or as to render him subject to undue influence, it is neces-

[1] Re Dyre's Estate, 12 Phila. 156.

[2] Bootle v. Blundell, 19 Ves. Jr. 494.

[3] Lee v. Lee, 4 McCord, L. 183, 17 Am. Dec. 722.

[4] Austen v. Grahem, 29 Eng. L. & Eq. 38.

[5] Nichols v. Binns, 1 Swab. & T. 239.

[6] Young v. Stevens, 48 N. H. 133, 2 Am. Rep. 202, 97 Am. Dec. 592; Dennett v. Dennett, 44 N. H. 531, 84 Am. Dec. 97.

[7] Davis v. Calvert, 5 Gill & J. 269, 25 Am. Dec. 282.

[8] Beaubien v. Cicotte, 12 Mich. 459; Young v. Ridenbaugh, 67 Mo. 574.

sary to consider the disposition of property undertaken, as well as the testator's character and surroundings.[1] The physical and mental condition of the testator, from which capacity or incapacity may be adduced, is a question of fact which may be shown by evidence of physical or mental manifestations, and the opinions of professional witnesses as inferences of fact therefrom.[2] It is partly within the range of common observation, and partly within that of special medical experience, and in determining it the court should inform itself of the general results of medical observations, and compare the sayings and doings of the testator while insanity is alleged to exist, with his sayings and doings when he was sane, and the sayings and doings of other sane persons resembling him with the sayings and doings of other insane persons.[3] And the number, intelligence, and character of the witnesses should have great weight with the jury.[4] So, insanity or weakness of mind over which undue influence is exerted must be affirmatively proved, and cannot be established by surmise or suspicion.[5] But to invalidate a will it is not necessary that insanity should appear on the face of the instrument itself.[6] And proof of incompetency or of undue influence need not be positive as distinguished from circumstantial.[7] And the question where the sanity of a testator is impeached, and the evidence is conflicting, is not whether the facts adduced in support of sanity are not in general indications of sanity, but whether they are inconsistent with or sufficiently explanatory of the indications of insanity produced by the other side.[8]

§ 26. *Previous and subsequent insanity.*

The point of time to be considered at which the capacity of a testator is to be tested is that at which the will was executed,[9] and

[1] Stebbins v. Hart, 4 Dem. 501.
[2] Kempsey v. McGinniss, 21 Mich. 123.
[3] Smith v. Tebbitt, L. R. 1 Prob. & Div. 401.
[4] Lee v. Lee, 4 McCord L. 183, 17 Am. Dec. 722.
[5] Allen v. Public Administrator, 1 Bradf. 378.
[6] Fowlis v. Davidson, 6 Notes of Cases, 461.
[7] Reichenbach v. Ruddach, 127 Pa. 564.
[8] Steed v. Calley, 1 Keen, 620.
[9] Kinne v. Kinne, 9 Conn. 102, 21 Am. Dec. 732; Lodge v. Lodge, 2 Houst. (Del.) 419; Terry v. Buffington, 11 Ga. 337, 56 Am. Dec. 423; Clark v. Ellis, 9 Or. 128; Chrisman v. Chrisman, 16 Or. 127; Re McCullough's

what the testator said and did at that time is the best evidence of what he was capable of doing.[1] And the evidence of attesting witnesses and others who were present at the time, all things being equal, is to be most relied upon.[2] The jury may consider the question of the sanity or insanity of the testator both before and after the execution of the will, however, as bearing upon and tending to show the state of his mind at that time.[3] And where a testator was prostrated by paralysis both in body and mind, so as to have been unquestionably incapable of making a will, the question is whether or not he has so far recovered as to be able to make one, and to ascertain this no particular moment of time should be selected, but the whole period should be reviewed from the paralytic stroke to the date of the will.[4] Where habitual insanity is established preceding and following the making of the will the burden is shifted to the proponent to show sanity at the time of its execution,[5] notwithstanding the fact that its provisions were wise and judicious.[6] Acts of an habitual character are of more force in proof of the existence of insanity where clear and decisive insanity has been established at a prior time, and a subsequent insane act may reflect back on acts otherwise equivocal.[7] And a jury in a will contest should not be told that there was not sufficient evidence of general insanity where a large amount of testimony was given as to the testator's mental condition shortly anterior to the making of his will.[8]

Will, 35 Pittsb. L. J. 169; Thompson v. Kyner, 65 Pa. 368; Harrison v. Rowan, 3 Wash. C. C. 580; White v. Wilson, 13 Ves. Jr. 87. And see Eastis v. Montgomery, 95 Ala. 486.

[1] Martin v. Thayer, 37 W. Va. 38.

[2] Clark v. Ellis, 9 Or. 128; Sheldon v. Dow, 1 Dem. 503.

[3] Kinne v. Kinne, 9 Conn. 102, 21 Am. Dec. 732; Terry v. Buffington, 11 Ga. 337, 56 Am. Dec. 423; Re Bull, 2 N. Y. Supp. 52; Thompson v. Kyner, 65 Pa. 368; Irish v. Smith, 8 Serg. & R. 573, 11 Am. Dec. 648; Harrison v. Rowan, 3 Wash. C. C. 580. And see Eastis v. Montgomery, 95 Ala. 486.

[4] Burton v. Scott, 3 Rand. 399.

[5] Chandler v. Barrett, 21 La. Ann. 58; Ford v. Ford, 7 Humph. 92; Elkinton v. Brick, 44 N. J. Eq. 154, 1 L. R. A. 161.

[6] Chandler v. Barrett, 21 La. Ann. 58.

[7] Wheeler v. Alderson, 3 Hagg. Eccl. Rep. 578.

[8] Reichenbach v. Ruddach, 127 Pa. 564.

But proof of insanity at one period as an independent fact will not impeach a will made at another period.[1] The mental disability of a party at some period prior to the execution of his will is not alone sufficient to invalidate it.[2] And a jury is not bound to find the testator insane because he had been found so at the time of making a subsequent will, a few weeks later, by another jury, though they find that there had been no material change in his mental condition between the times at which the wills were made.[3] And prior and subsequent insanity are only important as they throw light upon the testator's mind, and show its actual condition when the will was executed.[4] Where he is found to have a sound and disposing mind and memory at the time the will is made, his previous and subsequent condition is not to be considered.[5] And conflicting evidence tending to show, on the one hand, that the testatrix was almost an idiot, and, on the other hand, that she retained her mental faculties, narrows the controversy to the time of the execution of the will.[6] It must be left to the presiding judge to determine how far acts of the testator before and after the execution of his will may have a tendency to throw light upon his actual condition at the date of his will,[7] the fact that the evidence refers to a prior and subsequent period going to the effect or weight and importance to be attached to it rather than to its admissibility;[8] and the weight to be given it with reference to the length of time elapsing is for the determination of the jury,[9] the value diminishing as a general rule in proportion to the remoteness from the date of the making of the will.[10] And where senile dementia is alleged, which must of necessity be of long

[1] Terry v. Buffington, 11 Ga. 337, 56 Am. Dec. 423. And see Wheeler v. Alderson, 3 Hagg. Eccl. Rep. 574.

[2] Brown v. Torrey, 24 Barb. 583; Reichenbach v. Ruddach, 127 Pa. 564; Holloway v. Galloway, 51 Ill. 159.

[3] Sewall v. Robbins, 139 Mass. 164.

[4] Chrisman v. Chrisman, 16 Or. 127.

[5] Grubbs v. McDonald, 91 Pa. 236.

[6] Sheldon v. Dow, 1 Dem. 503.

[7] Shailer v. Bumstead, 99 Mass. 112.

[8] Conely v. McDonald, 40 Mich. 150.

[9] Dale's Appeal, 57 Conn. 127.

[10] Thompson v. Ish, 99 Mo. 160. And see Davis v. Latta, 93 Iowa, 811; Re Lillibridge's Estate, 133 Pa. 211.

standing and progressive, testimony covering a connected period of six years after the execution of the will is not too remote.[1] But a finding that there was no evidence of incapacity is proper where the only testimony given to establish it was that of a daughter who had seen the testator about five years before his death, and of a granddaughter who had seen him about four years before.[2] And mental incompetency not amounting to idiocy must be shown by testimony of witnesses who had personal knowledge of the facts within twenty years previous to the time the will was executed,[3] and evidence of incapacity must be very strong to overthrow a will twenty years after the death of the testator.[4]

So, proof of previous or subsequent insanity is liable to be overcome by evidence tending to show competency at the exact time the will was made.[5] And evidence of consciousness and rationality at the time given by subscribing witnesses and others who were then present will sustain a will as against proof that the testator was delirious several hours before,[6] or as against evidence that he labored under an insane delusion on the three days preceding its execution, and that he committed suicide on the day following its execution, where it was drawn by himself and was rational in its nature.[7] Nor is such evidence overcome by proof of the delirium of typhoid fever which was intermittent at frequent intervals, approaching very near to the time of the execution of the will.[8] And evidence of flightiness and mental aberration, not applying to the exact time of making a will, will not invalidate it where the will was natural and in accordance with previously formed intentions, and afterwards republished expressing the dispositions made with great deliberation.[9] But mere proof of calmness on the part of a testator, and of his transacting matters of formal business under the sanction of his family, is

[1] Bever v. Spangler, 93 Iowa, 576.
[2] Davis v. Latta, 93 Iowa, 811.
[3] Hoban v. Campau, 52 Mich. 346.
[4] Re Lillibridge's Estate, 133 Pa. 211.
[5] Whitenack v. Stryker, 2 N. J. Eq. 8.
[6] Re Lyddy's Will, 5 N. Y. Supp. 636.
[7] Chambers v. Queen's Proctor, 2 Curt. Eccl. Rep. 415.
[8] Re Bush's Will, 5 N. Y. Supp. 23.
[9] Re Mahoney's Will, 58 Hun, 608, 34 N. Y. S. R. 183.

not sufficient to rebut the presumption of incapacity arising from insanity before the execution of his will.[1]

§ 27. *Testimony of attesting witnesses and others present.*

The testimony of the subscribing witnesses to a will concerning the testator's mental condition and the circumstances attending its execution is entitled to great weight upon the question of testamentary capacity where they are persons of intelligence and veracity,[2] and so is that of the attending physicians.[3] And next after them evidence of others who were present at the execution of the will is to be mainly relied upon.[4] And an instruction that ordinarily those witnesses who come nearest to the very time of making the will would be most valuable if they seem worthy of credit, and that therefore the testimony of the subscribing witnesses is to be carefully considered, is not objectionable as telling the jury that their testimony was entitled to greater weight than that of other witnesses having the same means of knowledge.[5] Where the will appears fair, and the subscribing witnesses were above suspicion and aware of and competent to perform their duty, the incapacity which will invalidate a will should be established by facts showing a defect of mind existing in a form that might not have been detected.[6] And evidence as to testamentary capacity by the subscribing witnesses satisfies the burden of proof resting upon the proponent, making it the duty of the jury to determine the question of capacity from the weight of all the evidence introduced by all the parties,[7] though the burden is not shifted by such evidence under a statutory provision that every person of sound mind may make a will.[8]

So, the rule has been laid down that subscribing as a witness to a will is an assertion by the subscriber that the testator was of sound

[1] Evans v. Thomas, 2 Hagg. Eccl. Rep. 433.

[2] Jamison v. Jamison, 3 Houst. (Del.) 108; Whitenack v. Stryker, 2 N. J. Eq. 8; Cornelius v. Cornelius, 7 Jones, L. 593; Martin v. Thayer, 37 W. Va. 38; Harrison v. Rowan, 3 Wash. C. C. 580; Den, Stevens, v. Vancleve, 4 Wash. C. C. 262.

[3] Cornelius v. Cornelius, 7 Jones, L. 593.

[4] Den, Stevens, v. Vancleve, 4 Wash. C. C. 262.

[5] Foster v. Dickerson, 64 Vt. 233.

[6] Means v. Means, 5 Strobh. L. 167.

[7] Pendlay v. Eaton, 130 Ill. 69; Wilbur v. Wilbur, 129 Ill. 392.

[8] Crowninshield v. Crowninshield, 2 Gray, 524.

mind at the time;[1] and that proof of his signature is prima facie evidence of the testator's competency.[2] But the contrary rule has been elsewhere held, that the attestation of a will furnishes no evidence of any opinion as to the sanity of the testator,[3] and that where the attesting witnesses to a will are dead there is no presumption that if living they would testify that the testator was of sound mind when he made his will.[4] So, as a general rule, the subscribing witnesses are deemed to have been placed around the testator to ascertain and judge as to his capacity, and are required to be produced if living and subject to the process of the court.[5] And proof of a will by one subscribing witness only is insufficient under a statute requiring the subscribing witnesses to attest not only the corporal act of signing, but also the sanity of the testator,[6] or under one requiring the subscribing witnesses to swear they believe the testator to be of sound mind.[7] And where one subscribing witness testifies in favor of sanity, and the other against it, other witnesses cannot be called to establish the will.[8] To entitle a will devising real estate to probate, competency and freedom from restraint must properly be shown by the testimony of at least two subscribing witnesses who should have had at least some acquaintance with the testator.[9] And the testimony of a single subscribing witness who was a stranger to the testator, the other being dead, is not sufficient under a statute providing for probate, where it appears to the surrogate that the testator was competent to make a will.[10] But where a will is merely re-

[1] Egbert v. Egbert, 78 Pa. 326; Harden v. Hayes, 9 Pa. 151; Sellars v. Sellars, 2 Heisk. 430. And see Scribner v. Crane, 2 Paige, 147, 21 Am. Dec. 81.

[2] Harden v. Hays, 9 Pa. 151; Heyward v. Hazard, 1 Bay, 335; Evans v. Arnold, 52 Ga. 169.

[3] Baxter v. Abbott, 7 Gray, 71.

[4] Boardman v. Woodman, 47 N. H. 120; Flanders v. Davis, 19 N. H. 139.

[5] Chase v. Lincoln, 3 Mass. 237. And see Bootle v. Blundell, 19 Ves. Jr. 494.

[6] Withington v. Withington, 7 Mo. 589.

[7] See Allison v. Allison, 46 Ill. 61, 92 Am. Dec. 237; Weld v. Sweeney, 85 Ill. 50.

[8] Weld v. Sweeney, 85 Ill. 50.

[9] Swenerton v. Hancock, 9 Abb. N. C. 326.

[10] Ramsdell v. Viele, 6 Dem. 244.

quired to be attested by two witnesses it may be proved by one of them, who testifies to the attestation by the other, and to the competency of the testator, though the other does not testify.[1] And under this rule the fact that such witnesses are the witnesses of the court, and not of either party, is to be taken into consideration.[2] It has been held, however, that the inability of the subscribing witnesses to testify as to testamentary capacity does not invalidate the will, but goes only to the credibility of the witnesses.[3] and that it is not necessary that such witnesses should be called, or that when called they should concur in their testimony.[4] But a failure to examine the scrivener who wrote the will and the subscribing witnesses, to uphold it in a doubtful case, is a material and damaging circumstance against its validity.[5]

The testimony of subscribing witnesses to a will as to sanity, however, is not invested by law with any fictitious value beyond what it is worth under the usual considerations governing the value of other testimony, but it is to be weighed with reference to special opportunity and occasion to observe at the precise time, as well as with reference to care, skill, judgment, memory, and veracity.[6] They are not necessarily the best witnesses to prove the sanity of the testator,[7] and an instruction that the law presumes from the oath of the subscribing witnesses that the testator was of sound mind and memory is erroneous as likely to lead the jury to believe that the presumption is conclusive.[8] And a will should not be admitted where the attesting witnesses testify merely to the signature of the testator where he is proved to have been a person of imbecile mind.[9] Nor should a will be probated upon the testimony of a subscribing witness that he did not know whether the testator was of sound mind or not under a statute requiring the subscribing witnesses to swear they believed

[1] Cheatham v. Hatcher, 30 Gratt. 56, 32 Am. Rep. 650.
[2] Bootle v. Blundell, 19 Ves. Jr. 494.
[3] Huff v. Huff, 41 Ga. 696.
[4] Rigg v. Wilton, 13 Ill. 15, 54 Am. Dec. 419.
[5] Re Ulmer's Appeal (Pa.) 11 Cent. 403.
[6] Thornton v. Thornton, 39 Vt. 122.
[7] McTaggart v. Thompson, 14 Pa. 149.
[8] Keithley v. Stafford, 126 Ill. 527.
[9] Starnes v. Marten, 1 Curt. Eccl. Rep. 294; Evans v. Arnold, 52 Ga. 169.

the testator to have been of sound mind,[1] though witnesses need not swear positively as a matter of fact that he was sane.[2] And it has been held unnecessary that the subscribing witnesses should state their opinions as to the testator's mental capacity, as such opinions are necessarily mere inferences drawn from facts observed.[3]

Nor are subscribing witnesses debarred by any rule of law from testifying to the testator's insanity.[4] A will may be established against the testimony of subscribing witnesses who depose against the testator's capacity.[5] And where the subscribing witnesses disagree other proof may be given on the question of capacity, leaving the jury to decide upon the whole evidence.[6] Where the subscribing witnesses testify to want of testamentary capacity in opposition to the fair significance and import of their act in attesting, it detracts largely from the weight which would otherwise be given their opinions,[7] and the evidence, though admissible, will be received with the most scrupulous jealousy.[8] Nor is a refusal to instruct that certain testimony against sanity creates a strong presumption against the validity of the will erroneous where the testimony is that of an attesting witness, though he was also the testator's attending physician.[9] And a subscrib-

[1] Allison v. Allison, 46 Ill. 61, 92 Am. Dec. 237.

[2] Allison v. Allison, 46 Ill. 61, 92 Am. Dec. 237.

[3] Cilley v. Cilley, 34 Me. 162.

[4] Garrison v. Blanton, 48 Tex. 299; Howard v. Braithwaite, 1 Ves. & B. 202.

[5] Howard's Will, 5 T. B. Mon. 199, 17 Am. Dec. 60; Maupin v. Wools, 1 Duv. 223; Higgins v. Carlton, 28 Md. 115, 92 Am. Dec. 666; Sechrest v. Edwards, 4 Met. (Ky.) 163; Re Jenkins's Will, 43 Wis. 610; Le Breton v. Fletcher, 2 Hagg. Eccl. Rep. 558; Low v. Jolliffe, 1 W. Bl. 365; Bootle v. Blundell, 19 Ves. Jr. 494.

[6] Rigg v. Wilton, 13 Ill. 15, 54 Am. Dec. 419.

[7] Re Storey's Will, 20 Ill. App. 183; McMeekin v. McMeekin, 2 Bush, 79; Garrison v. Garrison, 15 N. J. Eq. 266; Re Cook's Estate, 16 Phila. 322; Cheatham v. Hatcher, 30 Gratt. 56, 32 Am. Rep. 650; Re Lewis's Will, 51 Wis. 101; Jones v. Goodrich, 5 Moore P. C. 16.

[8] Hoerth v. Zable, 92 Ky. 202; Re Cook's Estate, 41 Phila. Leg. Int. 6; Lamberts v. Cooper, 29 Gratt. 61; Young v. Barner, 27 Gratt. 96; Den, Stevens, v. Vancleve, 4 Wash. C. C. 262; Harrison v. Rowan, 3 Wash. C. C. 580; Bootle v. Blundell, 19 Ves. Jr. 494; Howard v. Braithwaite, 1 Ves. & B. 202.

[9] Thornton v. Thornton, 39 Vt. 122.

ing witness testifying against sanity may be contradicted by the party calling him by reading his evidence at a former trial, or by proof of declarations made at other times.[1] And evidence of an attesting witness, that the testator was incompetent, will not affect the validity of the will as against testimony of the other in favor of capacity, where it was at variance with previous statements made by him.[2] But a subscribing witness who contradicts his own attestation by statements that the testator was incompetent may be a good witness to support another witness with reference to other matters.[3]

§ 28. *Preparation of the will.*

The fact that a will was written by the testator himself, and that its provisions were sensible and judicious, is cogent evidence of testamentary capacity at the time of making it,[4] and it is prima facie evidence of his competency, casting the burden of proof upon those who allege the contrary to repel the presumption of sanity.[5] And the evidence of unsoundness to overcome a will written or dictated by the testator without prompting, which is in itself intelligible and consistent, disposing of all of his property, must be very strong and convincing.[6] The fact that the testator either wrote or dictated his will shows his mental and physical capability of doing whatever the instrument shows was done, leaving only the question whether or not the will on its face indicated that it emanated from an unsound mind.[7] So, the minute recollection of a testator of instructions given for the preparation of his will some time afterwards is cogent evidence of capaci-

[1] Harden v. Hays, 9 Pa. 151.

[2] Cheatham v. Hatcher, 30 Gratt. 56, 32 Am. Rep. 650.

[3] Broome v. Ellis, 2 Lee, Eccl. Rep. 528.

[4] Overton v. Overton, 18 B. Mon. 61; Weir's Will, 9 Dana, 434; Re Violet's Will, 1 Bibb, 617; Coghlan v. Coghlan, cited in 1 Phillim. 120; Singer v. Isbey, 4 Lanc. L. Rev. 193; Re Berrien's Will, 35 N. Y. S. R. 255; Chambers v. Queen's Proctor, 2 Curt. Eccl. Rep. 415.

[5] Temple v. Temple, 1 Hen. & M. 476; Hawkins v. Grimes, 13 B. Mon. 257; Kingsbury v. Whitaker, 32 La. Ann. 105, 36 Am. Rep. 278; Re Bey, 46 La. Ann. 773, 24 L. R. A. 577.

[6] Spratt v. Spratt, 76 Mich. 384; Fulleck v. Allinson, 3 Hagg. Eccl. Rep. 527.

[7] Spratt v. Spratt, 76 Mich. 384. And see Pancoast v. Graham, 15 N. J. Eq. 294; Kinne v. Johnson, 60 Barb. 69.

ty, though his mind may have been greatly impaired.[1] And a will which is the work of the testator himself, making a just disposition of his property, which was not procured by duress or undue influence, will be sustained though he was very old and confined to his bed by local affliction.[2] And evidence that the testator dictated his will without interference, and understood its contents, will sustain the will as against evidence of age and its attendant infirmities,[3] or that he was weak-minded and spoke disconnectedly and talked to himself and never attended to business,[4] or as against a strong array of medical and other testimony against his sanity.[5] So, evidence that a testator had contemplated making a will, and selected the attorney to draw it, and given directions specifically, clearly, and understandingly, stating his general design, and discussing its various parts, will sustain the will as against evidence of defective memory and incoherency and unreasonableness and inability to understand.[6] And the fact that a testator sent for an attorney to prepare his will, and informed him that he was to make an alteration in a former will, dictating its terms and provisions, is cogent evidence of his capacity, notwithstanding previous statements that he was satisfied with the former will.[7] Nor will subsequent loose declarations affect the validity of a will when it appears that the testator understood the nature of the act and the disposition he was making.[8] And the facts that a will was dictated to a strange attorney, who knew nothing of the testator's property, family, or testamentary purposes, and that the will itself evidenced an intelligent understanding of its terms and a knowledge of the claims upon his bounty, are sufficient to satisfy the court that the

[1] Tomkins v. Tomkins, 1 Bail. L. 92, 19 Am. Dec. 656; Re Napfle's Estate, 134 Pa. 492.

[2] Watson v. Watson, 2 B. Mon. 374; Coghlan v. Coghlan, cited in 1 Phillim. 120.

[3] Re Pensyl, 157 Pa. 465.

[4] Errickson v. Fields, 30 N. J. Eq. 634. And see Re Napfle's Estate, 134 Pa. 492.

[5] Pancoast v. Graham, 15 N. J. Eq. 294; Spratt v. Spratt, 76 Mich. 384.

[6] Pilling v. Pilling, 45 Barb. 86.

[7] Martin v. Thayer, 37 W. Va. 38.

[8] Irwin v. Deschamps, 11 W. N. C. 365.

will represented his intentions.[1] So, a testator cannot be held incompetent to transact business where after his will is read to him he objects to it as not being as he wants it and directs that it be drafted differently.[2] A will not shown to have been written by the testator, or in pursuance of instructions given by him, however, is not of itself evidence of testamentary capacity.[3] And the burden of proving a will resting with the propounder is generally discharged by proof of capacity, and the fact of execution from which a knowledge of and assent to its contents might be presumed.[4] But a will will not be deemed the act of a testator who was very old and infirm and deaf and almost blind, where it was drawn from directions given by the executor, and no instructions are proved to have been given by him;[5] and proof that a testator answered questions relating to his will at the time of its execution is not sufficient to show testamentary capacity.[6]

§ 29. *Rationality.*

Dispositions made by a testator of his property, as well as the character and circumstances of the person appointed to execute his will, are proper subjects for consideration upon the issue of testamentary capacity.[7] And it is permissible to inquire whether a will is just and reasonable and consonant with the state of the testator's family relations.[8] Where the capacity of a testator is doubtful the rationality of his will is a circumstance in favor of capacity.[9] The best proof of a sound mind is a rational act rationally done.[10] Though a charge to the effect that the will itself

[1] Dickie v. Van Vleck, 5 Redf. 284.

[2] Stuyvesant v. Wilcox, 92 Mich. 228.

[3] Singer v. Isbey, 4 Lanc. L. Rev. 193.

[4] Barry v. Butlin, 2 Moore, P. C. 482.

[5] Sankey v. Lilley, 1 Curt. Eccl. Rep. 391.

[6] Goldie v. Murray, 6 Jur. 608.

[7] Prather v. McClelland, 76 Tex. 574; Gombault v. Public Administrator, 4 Bradf. 226.

[8] Fountain v. Brown, 38 Ala. 72; Denison's Appeal, 29 Conn. 399; Evans v. Arnold, 52 Ga. 169.

[9] Tomkins v. Tomkins, 1 Bail. L. 92, 19 Am. Dec. 656; Griffin v. Griffin, R. M. Charlt. 217; Kinne v. Johnson, 60 Barb. 69.

[10] Weir's Will, 9 Dana, 434; Chambers v. Queen's Proctor, 2 Curt. Eccl Rep. 415.

is the best evidence of sanity is objectionable as an instruction upon the weight of evidence.[1] The production of a will executed according to law, which is rational on its face, furnishes a prima facia case of testamentary capacity,[2] and rationality and equality in a will made without dictation from others are conclusive of the testator's sanity.[3] In judging of the reasonableness of a will, however, due allowance must be made for caprice,[4] and it should not be set aside on unsatisfactory evidence *aliunde* where its provisions are not so extraordinary as to furnish evidence on incapacity or undue influence.[5] Nor is the inquiry cut off by the development of facts tending to vindicate the wisdom and fitness of the appointment of an executor.[6] Mere obscurity of language in a will is not evidence of testamentary incapacity where the testator comprehended it and it expressed his ideas correctly.[7] Nor is incapacity shown by grammatical inaccuracies in a will, and a want of knowledge of points of law or omission of a part of the testator's property.[8] And a mistake in a will as to the testator's age, and as to the order in which his daughters were born, and calling adopted children grandchildren, will not invalidate it as against direct evidence of strength and vigor of mind.[9] Though the fact that the name of the testator, signed to the will, is written and spelled differently from his usual mode, is a circumstance for the consideration of the jury.[10]

So, a will made by a testatrix giving her property to a nephew who had assisted her in opposing attempts of other relatives to get possession of her property will be upheld though she was under the control of a commission in lunacy, where its provisions

[1] Vance v. Upson, 66 Tex. 476.

[2] McCulloch v. Campbell, 49 Ark. 367; Chandler v. Barrett, 21 La. Ann. 58; Kingsbury v. Whitaker, 33 La. Ann. 1055, 36 Am. Rep. 278; Re Bey, 46 La. Ann. 773, 24 L. R. A. 577; Pancoast v. Graham, 15 N. J. Eq. 294; Symes v Green, 5 Jur. N. S. 742, 1 Swab. & T. 401.

[3] Re M'Daniel's Will, 2 J. J. Marsh. 331.

[4] Tomkins v. Tomkins, 1 Bail. L. 92, 19 Am. Dec. 656.

[5] Means v. Means, 5 Strobh. L. 167.

[6] Prather v. McClelland, 76 Tex. 574.

[7] Re Soule, 22 Abb. N. C. 236.

[8] Temple v. Temple, 1 Hen. & M. 476.

[9] Mairs v. Freeman, 3 Redf. 181.

[10] McMechen v. McMechen, 17 W. Va. 683, 41 Am. Rep. 682.

were the same as those of a previous will made when her sanity was unquestionable.[1] And a statement by a deformed testatrix, that she gave her property to her mother because of the great care and pains she had taken with her since her infancy because of her deformity, is strong proof of testamentary capacity.[2] And a codicil to a will which is indefinite should not be construed so as to be so absurd as to indicate unsoundness of mind where it is capable of a construction which would be reasonable.[3] Nor is a will withdrawn from consideration of the jury as evidence of testamentary capacity by an instruction that unless the evidence shows that the testator was of sound mind the instrument presented cannot be regarded as his will however it was drawn.[4] And the devotion by a testator of a larger portion of his estate to the purpose of aiding and paying off the debt incurred in subduing of the rebellion is not such an unreasonable disposition as to furnish evidence of testamentary incapacity.[5] Nor does a will giving a legacy to a dead sister tend to show want of testamentary capacity where it does not appear that the testatrix knew of her death when she made the will.[6] Evidence that the testator frequently changed a lease and finally did not execute it shows nothing but fickleness and caprice, and will not affect the validity of his will.[7] Nor will a speculative valuation placed by him on his property show an imbecile mind, though it might be a slight circumstance when connected with other facts tending to show testamentary incapacity.[8] Nor is the fact that the testator's bequest exceeded the amount of his estate sufficient of itself to impeach his soundness of mind, though it might be a circumstance which would aid a case of doubtful capacity.[9] And a will which leaves the residue, after giving various legacies, to the poor of a designated city, and for the erection of a cenotaph therein inscribed with his name, is not so absurd and irrational as to justify refusal

[1] Re Pendleton, 1 Connoly, 480.
[2] Re Howard's Will, 5 T. B. Mon. 199, 17 Am. Dec. 60.
[3] Re Weir's Will, 9 Dana, 434.
[4] Vance v. Upson, 66 Tex. 476.
[5] Re Lewis, 33 N. J. Eq. 219.
[6] McMasters v. Scriven, 85 Wis. 162.
[7] Jackson v. Hardin, 83 Mo. 175.
[8] Stokes v. Shippen, 13 Bush, 183.
[9] Tunison v. Tunison, 4 Bradf. 138.

to probate, where testator was familiar with and believed in the habits and superstition in vogue in that city.[1] Nor will a statement of the testator to a daughter whom he had disinherited, that he had given her a designated sum show testamentary incapacity.[2] And a statement by a testator that a certain slave ought to be set free, made after having made a will emancipating him, does not show insanity where he was not the sole owner of the slave and his will alone could not free him.[3]

So, a much greater degree of evidence is requisite to support a will sounding in folly or frenzy than one purporting to give effect to probable and rational intentions;[4] thus, a will giving two parcels of land of a designated number of acres each for homesteads, describing them in such a manner as to be about a mile long and only a few rods wide and entirely worthless for homesteads, furnishes cogent evidence that the testator did not know what he was doing.[5] And a will leaving a son and daughter, both of whom were insane and poor, a mere pittance, giving the balance of a large property for the building and adorning of a marble tomb, is invalid and not entitled to probate.[6] So, a declaration on the part of a testator possessed of considerable wealth, that he wished to put it where it would roll up to the day of judgment, pursuant to which he willed it to an association, is evidence of an insane delusion which would invalidate his will.[7] And a will disinheriting a sister, nieces, and nephews, for all of whom the testator entertained friendly feeling, giving his property to a church association, not to advance the cause of religion, but with the idea that his body would be preserved to the end of time by means of a metallic coffin or otherwise, is invalid.[8] Nor will a will be admitted to probate, though the instructions were rational and the testamentary paper was properly executed, where it appears that the testator had been afflicted with a delusion, the

[1] Austen v. Graham, 29 Eng. L. & Eq. 38.
[2] Clarke v. Davis, 1 Redf. 249.
[3] Re Weir's Will, 9 Dana, 434.
[4] Evans v. Knight, 1 Add. Eccl. Rep. 229.
[5] Lawrence v. Steel, 66 N. C. 584.
[6] Re Ramsdall, 20 N. Y. S. R. 466, 51 Hun, 636.
[7] American Bible Soc. v. Price, 115 Ill. 623.
[8] Morse v. Scott, 4 Dem. 507.

continued existence of which he had been instructed to conceal.[1]

§ 30. *Equality and justice.*

The reasonableness, equality, and consistency of the dispositions contained in a will are entitled to consideration on the question of testamentary capacity, particularly where the evidence is conflicting.[2] The intrinsic evidence offered by a will apparently rational, just, and prudent, and dictated by a testator of a self-poised and testamentary mind, will outweigh the mere opinions of witnesses that he was incompetent.[3] So, a will may by its provisions furnish intrinsic evidence involving it in suspicion and tending to show incapacity of the testator to make a disposition of his estate with judgment and understanding with reference to the amount and situation of his property, and the relative claims of the different persons who should have been the objects of his bounty.[4] And an unequal distribution of a testator's estate among his children is a circumstance calculated to arouse suspicion, and should go to the jury on the question of mental incapacity,[5] and undue influence.[6] And while a testator of sound mind may make such a disposition of his property as he pleases, it is error to instruct the jury that the contents of the will are not evidence of testamentary incapacity, however unreasonable and absurd its disposition may be, where it is impeached on the ground of fraud and imposition.[7] Nor will an instruction that

[1] Prinsep v. Dyce Sombre, 10 Moore P. C. 232; Sombre v. Troup, 1 Deane & S. 22. And see Symes v. Green, 5 Jur. N. S. 742, 1 Swab. & T. 401.

[2] Young v. Barner, 27 Gratt. 96; Sim v. Russell, 90 Iowa, 656; Gombault v. Public Administrator, 4 Bradf. 226; Clark v. Fisher, 1 Paige, 171, 19 Am. Dec. 402; Frazer v. Frazer, 2 Del. Ch. 260.

[3] McMeekin v. McMeekin, 2 Bush, 79; Griffin v. Griffin, R. M. Charlt. 217. And see Singer v. Isbey, 4 Lanc. L. Rev. 193.

[4] Davis v. Calvert, 5 Gill & J. 269; Clark v. Fisher, 1 Paige, 171, 19 Am. Dec. 402.

[5] Tobin v. Jenkins, 29 Ark. 151; Hughes v. Hughes, 31 Ala. 519; Knox v. Knox, 95 Ala. 495; Coleman v. Robertson, 17 Ala. 84. Salisbury v. Aldrich, 118 Ill. 199; Conway v. Vizzard, 122 Ind. 266; Lamb v. Lamb, 105 Ind. 456; Addington v. Wilson, 5 Ind. 137, 61 Am. Dec. 81; Gamble v. Gamble, 39 Barb. 373; Thompson v. Kyner, 65 Pa. 368; Broaddus v. Broaddus, 10 Bush, 299.

[6] Bledsoe v. Bledsoe (Ky.) 1 S. W. 10.

[7] Baker v. Lewis, 4 Rawle, 356. And see Evans v. Arnold, 52 Ga. 169.

no weight is to be given to injustice in a will, unless the will is actually invalid because of unsoundness of mind, be deemed a harmless error where there is evidence of unsoundness, though the will appears to be much as the testator intended to make it.[1] Gross inequality without reason therefor suggested in the will itself requires satisfactory evidence that it was the free and deliberate offspring of a disposing mind,[2] and is entitled in proportion to its degree of flagrancy to some auxiliary influence on the question of capacity, fraud, or controlling influence, and, unexplained and combined with other corroborating evidence, it may be entitled to great influence.[3] A will will not be avoided, however, merely because its provisions are imprudent and not to be accounted for,[4] or because it was not such a will as would have been expected from one in the testator's situation,[5] or because its provisions were not regarded as morally right,[6] or because of moral obliquity or prejudice exhibited therein.[7] Nor will an unnatural or unequal disposition of property *per se* destroy the validity of the will when it was executed by a person of sound mind,[8] in the absence of undue influence,[9] or raise a presumption of mental incapacity,[10] though it is cogent evidence of incapacity,[11]

[1] Sim v. Russell, 90 Iowa, 656.

[2] Harrel v. Harrel, 1 Duv. 203. But see Broaddus v. Broaddus, 10 Bush, 299.

[3] Kevil v. Kevil, 2 Bush, 614.

[4] Higgins v. Carlton, 28 Md. 115; Burr v. Davall, 8 Mod. 59; Davis v. Calvert, 5 Gill & J. 269.

[5] Watson v. Donnelly, 28 Barb. 653; Rice v. Rice, 50 Mich. 448, 53 Mich. 432.

[6] Martin v. Mitchell, 28 Ga. 382; Ross v. Christman, 1 Ired. L. 209.

[7] Den, Trumbull, v. Gibbons, 22 N. J. L. 117, 51 Am. Dec. 253.

[8] Mosser v. Mosser, 32 Ala. 551; Blakey v. Blakey, 33 Ala. 611; Hughes v. Hughes, 31 Ala. 519; Coleman v. Robertson, 17 Ala. 84; Potts v. House, 6 Ga. 328, 50 Am. Dec. 329; Schneider v. Manning, 121 Ill. 376; Salisbury v. Aldrich, 118 Ill. 199; Conway v. Vizzard, 122 Ind. 266; Kevil v. Kevil, 2 Bush, 614; Re Dietz, 41 N. J. Eq. 284; Boylan v. Meeker, 28 N. J. L. 274; Re Gleespin's Will, 26 N. J. Eq. 523; Re Gross, 7 N. Y. S. R. 739; Van Pelt v. Van Pelt, 30 Barb. 134; Rowland v. Sullivan, 4 Desauss. Eq. 518; Couch v. Eastham, 29 W. Va. 784.

[9] Trezevant v. Rains, 85 Tex. 329; Ross v. Christman, 1 Ired. L. 209.

[10] Knox v. Knox, 95 Ala. 495.

[11] Re Shaw's Will, 2 Redf. 107.

and mere inequality, however great, though accompanied by evidence of impaired mind, is not evidence of undue influence.[1] And the fact that a will is contrary to common sense, and that it outraged common feeling and displayed a want of ordinary affection, is not sufficient *ipso facto* to set it aside.[2] Unless a will carries clear marks on its face of being the product of a diseased mind its injustice or unreasonableness ought not to be the foundation of a verdict against it,[3] and the courts will not examine into the wisdom or prudence of a testator's disposition merely because he was a person of weak understanding.[4] The fact that a testator has given indication of mental unsoundness does not charge him with testamentary incapacity or make it necessary to view every instance of partiality or injustice with strong suspicion.[5] An injudicious will, though it will be regarded with suspicion, if it can be accounted for on any other reasonable hypothesis, will not be attributed to testamentary incapacity.[6] And a charge that an unequal distribution requires strict proof of fairness is error as tending to induce the jury to attach too much meaning to it.[7] And the jury should not be directly notified or required to examine and pass upon the question whether the will is just, wise, and proper.[8] It is improper, however, for the court to single out inequality of disposition in a will contest, and tell the jury that the testator had a right to make such distinction between the objects of his bounty as he chose, without also telling them that any gross inequality requires evidence that it was the act of a rational mind.[9] And an instruction that gross inequality without reason requires satisfactory evidence that it was the offspring of a rational mind is misleading as calculated to divert the minds of the jury from the issue of

[1] Re Storer, 28 Minn. 9.

[2] Thompson v. Kyner, 65 Pa. 368.

[3] Boylan v. Meeker, 28 N. J. L. 274; Collins v. Osborn, 34 N. J. Eq. 511.

[4] Hill v. Nash, 41 Me. 585, 66 Am. Dec. 266.

[5] Reichenbach v. Ruddach, 127 Pa. 564.

[6] Smith v. Smith, 48 N. J. Eq. 566.

[7] Tobin v. Jenkins, 29 Ark. 151.

[8] Carpenter v. Calvert, 83 Ill. 62.

[9] Sherley v. Sherley, 81 Ky. 240; Bledsoe v. Bledsoe (Ky.) 1 S. W. 10.

mental capacity to that of inequality.[1] So, a testator, when of sound mind and not under undue influence, may dispose of his property contrary to the dictates of duty and of natural and moral obligations if he chooses.[2] And the fact that a will is harsh, capricious, and unjust will not affect its validity.[3] Thus, the omission by a testator to mention one or some of his children in his will will not alone invalidate it.[4] Nor will the fact that the testator distributes his property among certain of his relatives, entirely omitting the others.[5] And the disposition by a testator of his property to a stranger to the exclusion of his brothers and sisters does not show testamentary incapacity.[6] Nor is the fact that the devisees and legatees were not relatives, but friends only, of any weight in support of a claim of want of testamentary capacity, in the absence of other evidence.[7] And a capricious bequest of a large legacy to a stranger of but a few days' acquaintance may be evidence of caprice or of sudden generous impulse, but is not of itself evidence of insanity.[8] The affections of a testator, rather than the apparent equality or justice of a distribution, are the true test of a natural will.[9] And discrimination by a testator against a son whose character and conduct had displeased him does not show mental unsoundness.[10] Nor will a bequest by a testator of a comparatively small portion

[1] Broaddus v. Broaddus, 10 Bush, 299.

[2] Bulger v. Ross, 98 Ala. 267; Hoerth v. Zable, 92 Ky. 202; Den, Trumbull, v. Gibbons, 21 N. J. L. 117, 51 Am. Dec. 253; Re Dietz, 41 N. J. Eq. 284; Boylan v. Meeker, 28 N. J. L. 274; Van Pelt v. Van Pelt, 30 Barb. 134; Lee v. Lee, 4 McCord, L. 183, 17 Am. Rep. 722; Couch v. Eastham, 29 W. Va. 784.

[3] Sefton v. Hopwood, 1 Fost. & F. 578; Gamble v. Gamble, 39 Barb. 373.

[4] Snow v. Benton, 28 Ill. 306; Addington v. Wilson, 5 Ind. 137, 61 Am. Dec. 81; Bledsoe v. Bledsoe (Ky.) 1 S. W. 10; Re Springstead, 55 Hun, 603, 28 N. Y. S. R. 186; Clark v. Ellis, 9 Or. 128; Re Cook's Estate, 16 Phila. 322; Kirkwood v. Gordon, 7 Rich. L. 478, 62 Am. Dec. 418.

[5] Spratt v. Spratt, 76 Mich. 384. And see Morris v. Morton, 14 Ky. L. Rep. 360.

[6] Collins v. Brazill, 63 Iowa, 432.

[7] Smith v. James, 72 Iowa, 515.

[8] Herbert v. Winn, 24 La. Ann. 385.

[9] Lucas v. Parsons, 27 Ga. 595.

[10] LaBau v. Vanderbilt, 3 Redf. 384.

of his estate to a daughter be of any weight where it appears that there had been an estrangement between them.[1] And a will giving the testator's entire property to his wife is not an unnatural one which will raise an inference of testamentary incapacity where they had always reposed entire confidence in each other.[2] Nor is a will providing more liberally for the testator's wife and daughter than for his other children, where the wife and daughter had won his affections by kindness.[3] Nor is a will invalidated by a discrimination in favor of an only daughter who had ministered to the testator's wants, as against granddaughters who had married and left home;[4] or by one in favor of a son against other children, though the motive was an inordinate ambition to perpetuate the success of the particular business enterprise in which he had acquired fame and fortune.[5] And in considering the use of the term "advancement" in a will, and considering the question with relation to equality of distribution and its bearing upon the testator's sanity, it should be taken to include any benefit which the testator might have reasonably considered to have been an appropriation of his estate.[6] So, the fact that the provisions made by a testator for a daughter is much less than she would have received in case of his intestacy, however unreasonable and unjust it may seem, is not of itself evidence of testamentary incapacity.[7] Nor is the fact that he was influenced by feelings of resentment and dislike causing him to omit a part of his children.[8] Neither will the fact that a mother disinherited her child prove testamentary incapacity, where she gave her property to her husband, giving as a reason therefor that he would take care of the child.[9] And a will of a testator disinheriting his young, motherless child is not thereby rendered invalid where he requested the

[1] Meeker v. Meeker, 75 Ill. 260.
[2] Re Lyddy's Estate, 24 N. Y. S. R. 607.
[3] Nailing v. Nailing, 2 Sneed, 630.
[4] Re Humphrey's Will, 26 N. J. Eq. 513.
[5] LaBau v. Vanderbilt, 3 Redf. 384.
[6] Barker v. Comins, 110 Mass. 477.
[7] Re Tracy, 11 N. Y. S. R. 103.
[8] Nicholas v. Kershner, 20 W. Va. 251; Sanderson v. Sanderson, 52 N. J. Eq. 243.
[9] Re Walther's Will, 7 N. Y. Supp. 417.

legatee to keep the child until womanhood or death.[1] Neither does a will giving the property of the testatrix to strangers raise an inference of want of mental capacity or undue influence where she was separated from her husband and unfriendly with him and with her next of kin.[2] Nor is a will making no provision for the testator's wife subject to attack where she had been cruel and unkind to him and driven him from the house.[3] Nor is a disposition of property to strangers instead of relatives, from motives of gratitude or personal attachment.[4]

The will of one who is *non compos mentis*, however, is a nullity, however just and prudent its provisions may be.[5] And a will giving all a testator's property to strangers furnishes intrinsic evidence tending to show incapacity, though it is not enough *per se* to justify setting aside the will.[6] And omission of a testator to provide for part of his children, though not itself sufficient to establish incapacity, is entitled to great consideration when not satisfactorily accounted for and there is evidence of fraudulent procurement.[7] So, the wife and children of a testator are the natural objects of his affections, and where they are disinherited it is proper for the jury to consider that fact upon the question as to whether or not he was insane or laboring under an insane delusion.[8] And an unnatural exclusion, by a testator, of his only daughter from participation in his estate, with whom he seemed to have had no difficulty and who was in need of aid from him, is a strong circumstance tending to show mental incapacity or undue influence.[9] And evidence that a testatrix gave her only relative $5, leaving the balance of her estate to an acquaintance, giving a reason therefor which had no existence in fact, is sufficient to require the reversal of a decree admitting her will to probate and a submission of the question of capacity to a

[1] Munday v. Taylor, 7 Bush, 491.
[2] Deas v. Wandell, 3 Thomp. & C. 128.
[3] Re Wintermute's Will, 27 N. J. Eq. 447.
[4] Re Snelling's Will, 136 N. Y. 515; Re Finn's Will, 1 Misc. 283.
[5] Potts v. House, 6 Ga. 324, 50 Am. Dec. 329.
[6] Cramer v. Crumbaugh, 3 Md. 491; Colhoun v. Jones, 2 Redf. 34.
[7] Goble v. Grant, 3 N. J. Eq. 629.
[8] Thomas v. Carter, 170 Pa. 272.
[9] Reynolds v. Root, 62 Barb. 250.

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jury.[1] Nor will a verdict against a will made by a person *in extremis*, giving his property to a religious institution in the hospital in which he died, drawn by the chaplain of the hospital, be set aside as against evidence where it ignores an actual heir and misdescribes the testator's nearest relatives and other evidence from which want of testamentary capacity and the existence of undue influence might be fairly inferred.[2] And a will leaving all the testator's property to charities except a sum to his executor large enough to be over and above any bribe by his relatives is unnatural and unreasonable upon its face, and not entitled to probate, though the subscribing witnesses testify to his sanity.[3] And the opinion of a medical attendant of an aged woman who had labored under delusions that she had recovered and the fact that her will contained a probable disposition and was made under instruction which did not favor incapacity, is not sufficient to overcome a presumption of insanity arising from the previous existence of a delusion.[4] Evidence of family differences and likes and dislikes, however, is not to be considered, except as they bear upon the testator's mental capacity at the time of the execution of the will.[5]

§ 31. *Conformity to previous intentions.*

The fact that a testamentary disposition accords with previously formed intentions formed when the testator was unquestionably sane is an important one to be considered in determining the validity of his will as tending to support it.[6] A will which purports to give effect only to probable intentions may be established by comparatively slight evidence of testamentary capacity, but very much more evidence is necessary to support an act purporting to contain dispositions contrary to the testator's probable in-

[1] Re Weil, 16 N. Y. S. R. 1.

[2] Miller v. St. Louis Hospital Asso. 73 Mo. 242.

[3] Re Lockwood's Will, 2 Connoly, 118.

[4] Johnson v. Blane, 6 Notes of Cas. 442.

[5] Re Lang's Estate, 65 Cal. 19.

[6] Conway v. Vizzard, 122 Ind. 266; Campbell v. Carnahan (Ark.) 13 S.W. 1098; Re Weir's Will, 9 Dana, 434; Re Berrien, 34 N. Y. S. R. 332; Exum v. Canty, 34 Miss. 533; Re Mahoney, 34 N. Y. S. R. 183; Goodacre v. Smith, 15 Week. Rep. 561; Coghlan v. Coghlan, cited in 1 Phillim. 120; Re Blakely's Will, 48 Wis. 294; Frazer v. Frazer, 2 Del. Ch. 260.

tentions or savoring in any degree of folly or frenzy.[1] And mere proof of a general understanding of a testator that he is the owner of property and has power to dispose of it by will, and of previous declarations of intent, and of gratitude and attachment to the donee, is sufficient to justify a finding that the will is valid, where the will itself is simple in form.[2] So, declarations of a testator of his intended disposition, corresponding with the provisions of his will, are strong evidence in support of it,[3] especially when taken in connection with testimony as to his sanity at the time of its publication.[4] But declarations showing a dislike for the beneficiary and an intention to give the estate to another do not show testamentary incapacity where sufficient time had elapsed between the declarations and the change in the will to permit a change of sentiment, and acts had been done which would have naturally tended to cause the change.[5] And an expression made many years before, of an intent to divide property equally between children, does not tend to show incapacity where a different disposition is made.[6] So, a will which, with a slight exception, confirms and ratifies a former will will not be set aside on the ground of testamentary incapacity where much of the testimony related to incidents after the will was made, and there was no testimony tending to show prior unsoundness of mind.[7] And a will in accordance with previous affections and intentions will not be disturbed on evidence consisting of letters of the testator, evidencing a failing intellect;[8] or proof that he was *in extremis* at a time when there was evidence of volition and capacity;[9] or by failure of memory and childishness, and peculiar delusions, where he appears to have known what he was about at the time;[10] or by evidence that he was excitable and sickly, and flew into fits of

[1] Evans v. Knight, 1 Add. Eccl. Rep. 229.

[2] Stewart v. Lispenard, 26 Wend. 255.

[3] Starrett v. Douglass, 2 Yeates, 46; Pancoast v. Graham, 15 N. J. Eq. 294.

[4] Starrett v. Douglass, 2 Yeates, 46.

[5] Re Shotwell's Estate, 1 Pa. Dist. R. 257.

[6] Rutherford v. Morris, 77 Ill. 397.

[7] Re Dunham, 15 N. Y. S. R. 869.

[8] Re Comstock, 26 N. Y. S. R. 292.

[9] Ross v. Chester, 1 Hagg. Eccl. Rep. 227.

[10] Moore v. Moore, 2 Bradf. 265.

passion on slight provocation, and displayed many symptoms of a diseased mind.[1] Nor will evidence that a testator was old, intemperate, and irascible establish testamentary incapacity as against evidence of rationality and business capacity, and that he contemplated the execution of the will for some time, and made inquiries as to the names of some of the persons mentioned in it.[2] So, while mere proof of the intention of a testator to make a different will from the one in question will not defeat it where he was of sound mind, if a testator dispose of all his property to a stranger, proof of affection on his part for his relatives tends to increase the probability that the will was not the result of his deliberate judgment.[3] A will making a disposition which is a total departure from former testamentary intentions long adhered to, however, is to be closely scrutinized,[4] especially where the capacity of the testator is doubtful at the time,[5] or where the will is reciprocal in its nature, made in conjunction with that of a brother,[6] and particularly if the person in whose favor the change is made possesses great influence and authority and originates and conducts the whole transaction.[7] And wills of a prior date to that offered for probate making a different disposition of the testator's property are entitled to considerable weight in determining the question of capacity and undue influence;[8] and such a change of disposition without proof of a corresponding change of feeling upon the part of a testator is sufficient to invalidate his will.[9] The weight as evidence of testamentary capacity of conformability of previous intentions depends upon whether or not the testator was capable of conversing on the subject at the time the will was made.[10]

[1] Re Macpherson, 1 Connoly, 223. And see Re Blakely's Will, 48 Wis. 294.

[2] Keating's Appeal, 19 Pitts. L. J. N. S. 283.

[3] Norris v. Sheppard, 20 Pa. 475.

[4] Marsh v. Tyrrell, 2 Hagg. Eccl. Rep. 84; Kinleside v. Harrison, 2 Phillim. Eccl. Rep. 449.

[5] Marsh v. Tyrrell, 2 Hagg. Eccl. Rep. 84.

[6] Kinleside v. Harrison, 2 Phillim. Eccl. Rep. 449.

[7] Marsh v. Tyrrell, 2 Hagg. Eccl. Rep. 84; Dodge v. Meech, 1 Hagg. Eccl. Rep. 612.

[8] Horne v. Horne, 9 Ired. L. 99.

[9] Esterbrook v. Gardner, 2 Dem. 543; King v. Farley, 1 Hagg. Eccl. Rep. 502.

[10] Bootle v. Blundell, 19 Ves. Jr. 494.

And an inference in favor of a will, drawn from the fact that its provisions are like those of a former will executed when the testator was sane, is sufficiently rebutted by the fact that it bears a still closer resemblance to another will made when he was clearly insane.[1] So, evidence that a testator was subject to sick spells, during which his mind wandered, and that his hearing and eyesight were impaired and his memory very poor, and that his will was not in accordance with previously expressed intentions, warrants a finding of testamentary incapacity in the absence of evidence that he knew the contents.[2] And the will of one who is easily influenced and made to believe things incredible and impossible, and whose purpose frequently changes with changes of scenes, associations, or company, is not competent to make a will though competent to converse rationally on subjects familiar to him.[3] Nor should a will be admitted to probate where a change had been made in it when the enfeebled condition of the testator rendered him incapable of dictating it by the only means at his command.[4] And a holding that a testator was incompetent to make a will was justified by evidence that, after deciding while sane not to make a will, he ultimately signed one directed by others, and brought to him after his mind had greatly weakened, though there was some evidence tending to show that he was possessed of a disposing mind;[5] nor does an act derive strength from a fixed purpose to do it, where it is not shown to be a reasonable act.[6]

The question of the competency of a testator to change a will involves the inquiry whether he was of sufficient mental soundness to change any previously existing purpose he might have formed;[7] and the mere fact that a will is not in the direction of a preconceived purpose is of no weight unless a testator was of unsound mind.[8] And mere proof of a change by a testator

[1] Carrico v. Neal, 1 Dana, 163.

[2] Re Liddington's Will, 20 N. Y. S. R. 610.

[3] Shropshire v. Reno, 5 J. J. Marsh. 91; Re Farnsworth's Will, 62 Wis. 474.

[4] Rollwagen v. Rollwagen, 5 Thomp. & C. 402.

[5] Alston v. Jones, 17 Barb. 276.

[6] Frazer v. Frazer, 2 Del. Ch. 260.

[7] Re Hoover, 8 Mackey, 495.

[8] Re Hoover, 8 Mackey, 495.

of his will is not sufficient to show that he was insane,[1] though supported by evidence of forgetfulness and unreasonable fear of personal violence;[2] nor is it sufficient to invalidate a will where a change of feeling toward the former beneficiary appears,[3] or where the variation is accounted for by a change of circumstances.[4] And an unequal will, reciting that advancements equal to the difference had been made since the former will distributing the property equally, will not raise an inference that the testator's faculties had failed, in the absence of evidence that no such advancements had been made.[5] And an instruction that a declaration of an intention to make a different will is a circumstance entitled to consideration on the question of competency and undue influence without qualification is erroneous, as authorizing a controlling effect to be given to a single item of evidence without regard to others.[6]

§ 32. *Subsequent recognition.*

The subsequent apparent recognition by a testator in his conversations or actions of his will is strong evidence of consciousness and mental capacity, and that he was not imposed upon at the time it was made.[7] And keeping a will uncanceled gives rise to a presumption that it was not procured against the testator's will and intelligent consent, whether fraud, undue influence, or mental incapacity is set up.[8] So, a will will be held to be valid where a subsequent codicil thereto was executed, if the jury are satisfied of the testator's capacity at the time of the execution of the codicil, without reference to his condition at the time the original will was made.[9] But where a person placing a holographic will among his valuable papers was insane so that his act could have no effect, it would require clear proof of retaining it in such repository in a lucid interval to give it effect as a valid disposition of

[1] Vance v. Upson, 66 Tex. 476; Newton v. Carbery, 5 Cranch, C. C. 626.
[2] Potter v. McAlpine, 3 Dem. 108.
[3] Re McDonald's Estate, 130 Pa. 480.
[4] Williams v. Goude, 1 Hagg. Eccl. Rep. 577.
[5] Rankin v. Rankin, 61 Mo. 295.
[6] Quisenberry v. Quisenberry, 14 B. Mon. 481.
[7] Jones v. Harris, 3 Rich. L. 14.
[8] Pierce v. Pierce, 38 Mich. 412.
[9] Brown v. Riggin, 94 Ill. 560.

his property, and the mere retention of the paper during the time when he was of a sound and disposing mind and memory is not conclusive that he intended it to be his will.[1]

§ 33. *Capacity to transact business.*

A person of common sense must be deemed to have testamentary capacity.[2] Capacity to make money and take care of property, though not conclusive, is evidence of sanity.[3] And substantial business acts of a testator are of more weight on the question of his mental capacity than mere conversations or occasional doings not connected with business.[4] That a testator was capable of transacting business, and was shrewd and firm in his bargains, is sufficient to establish his testamentary capacity.[5] And evidence of the proper conduct of the ordinary concerns of life as a sane man is sufficient as against proof that the will sounds of folly,[6] or as against proof that the testator was eccentric, excitable, passionate, and very nervous, and believed in spiritualism, Mormonism, or Fourierism, having visions and believing in them, and talking like a fool;[7] or as against proof of eccentricity, or fits of melancholy,[8] or weakness of mind,[9] and occasional fits of epilepsy;[10] or as against evidence of eccentricity and delusion and derangement at different periods where it appears that the derangement was not continuous;[11] or against proof of old age and a disturbed and excited state of mind,[12] and failing memory;[13] or against evidence that the testator's mind wandered, and that he was incoherent in speech, where his will was reasonable;[14] or

[1] Porter v. Campbell, 2 Baxt. 81.
[2] Re Howard's Will, 5 T. B. Mon. 199, 17 Am. Dec. 60.
[3] Gass v. Gass, 3 Humph. 278.
[4] Turner v. Hand, 3 Wall. Jr. 120.
[5] Re Gleespin's Will, 26 N. J. Eq. 523; Chandler v. Barrett, 21 La. Ann. 58; Prentis v. Bates, 88 Mich. 567.
[6] Arbery v. Ashe, 1 Hagg. Eccl. Rep. 214.
[7] Turner v. Hand, 3 Wall. Jr. 88.
[8] Brick v. Brick, 66 N. Y. 144.
[9] White v. Farley, 81 Ala. 563; Tomkins v. Tomkins, 1 Bail. L. 92, 19 Am. Dec. 656.
[10] Brown v. Torrey, 24 Barb. 583.
[11] White v. Driver, 1 Phillim. 84.
[12] Gardiner v. Gardiner, 34 N. Y. 155.
[13] Re Cline's Will, 24 Or. 175; Re Stewart, 39 N. Y. S. R. 801.
[14] Re Buckley, 16 N. Y. S. R. 983.

as against proof that he was unbalanced and unsettled, and almost if not quite a monomaniac with reference to a particular subject, where he appeared to comprehend the character of the business in which he was engaged.[1] And the fact that the testator had sufficient capacity to acquire a fortune will prevail as against the opinions of a cloud of ignorant witnesses that he did not have testamentary capacity.[2]

So, the fact that a testator continued to do business with shrewdness and sagacity is sufficient to sustain his will as against evidence of increasing infirmities of age and failure to recognize persons and places, and frequent declarations on his part that he was not fit to do business;[3] or as against evidence of age and impaired eyesight and attacks of vertigo attended with brief unconsciousness and loss of memory and physical exhaustion, and the fact that the testator had surrendered most of his business into other hands, where it appears that he still transacted business and was able to understand what he was doing;[4] or as against evidence of a stroke of an apoplectic nature affecting the testator's vocal organs, and a form of progressive paralysis and a gradual weakening of the physical and mental powers, incident to old age;[5] or as against evidence of a failure to make provisions in the will for a person having a natural claim upon the testator's bounty where reasons are given for such omission.[6]

Neither is proof of ability to transact business overcome by evidence drawn from an autopsy, that the testator had tumors in the brain, which could not exist without serious mental weakness.[7] And clear, sensible, and coherent letters written to relatives about business matters shortly before the execution of the will are entitled to great weight upon the question of capacity where it is claimed that the testator was afflicted with chronic dementia which is of slow progress marked in its regular stages by general impairment of the mental faculties ending in idiocy.[8] Nor will

[1] Ean v. Snyder, 46 Barb. 230.
[2] Eddey's Appeal, 109 Pa. 406. And see Comb's Appeal, 105 Pa. 155.
[3] Re Bartholick, 1 Connoly, 373.
[4] Re Soule, 1 Connoly, 18.
[5] Re Birdsall, 2 Connoly, 433.
[6] Re Ogden, 2 N. Y. Supp. 345; Re Gray, 1 Silv. 338.
[7] Re Fricke, 47 N. Y. S. R. 10.
[8] Re Blakely's Will, 48 Wis. 238.

a will be set aside for mental incapacity where there is a conflict of evidence as to the testator's condition, and it appears that he continued to manage his business intelligently, and gave instructions for its execution.[1] But the general proposition that affirmative testimony should outweigh negative testimony does not apply in a will contest on the ground of mental incapacity where some of the witnesses swear that the testator could do business acts, and others testify that he could not.[2] And entries made by a testator in his books are not conclusive of sanity, the weight to which they are entitled being a question for the jury.[3] And mere proof of the transaction of ordinary business by the testator in connection with his will tends to rebut a presumption arising from proof of a previously existing delusion, the question whether it is sufficient being also solely for the jury.[4] So, evidence of great derangement causing aimless and foolish actions and forgetfulness of friends and relatives may be such as to invalidate a will, though there was evidence of ability to conduct private business matters.[5] And where the weight of evidence shows incapacity to transact ordinary business, testamentary incapacity is sufficiently established.[6] And proof of business capacity in ordinary transactions will not sustain a will as against evidence of the existence of insane delusions with reference to the subject-matter and the object of the disposition,[7] though it would tend to rebut a presumption raised by proof that a delusion existed a short time before, its sufficiency for that purpose being solely a question for the jury.[8]

§ 34. *Acts and conduct.*

A perfect capacity is usually tested by the question as to whether the individual talks and discourses rationally and sensibly and is fully capable of any rational act requiring thought,

[1] Coit v. Patchen, 77 N. Y. 533.

[2] Potts v. House, 6 Ga. 324, 50 Am. Dec. 329.

[3] Irish v. Smith, 8 Serg. & R. 573, 11 Am. Dec. 648.

[4] Wood v. Sawyer, Phill. L. 251.

[5] Bever v. Spangler, 93 Iowa, 576; Yglesias v. Dyke, Perrog. Ct. (1852) cited in 2 Taylor Prin. Med. Jur. 556.

[6] Minor v. Thomas, 12 B. Mon. 106; Townsend v. Bogart, 5 Redf. 93.

[7] Morse v. Scott, 4 Dem. 507; Re Shaw, 2 Redf. 107; Smee v. Smee, L. R. 5 Prob. Div. 84; Banks v. Goodfellow, 22 L. T. N. S. 820.

[8] Wood v. Sawyer, Phill. L. 251.

judgment, and reflection.'[1] And an inference of testamentary incapacity may be legitimately based upon the fact that the acts and language of the party are those of an insane person,[2] though the declarations of an insane person do not tend to establish his insanity,[3] and in judging of the unsoundness of the testator he is to be compared with himself, and not with others.[4] But evidence of occasions when the conversations and conduct of the testator were inconsistent with what might be expected of a man of sound intellect is not alone sufficient to invalidate his will,[5] nor is evidence of acts of folly occasionally occurring, where the provisions of the will were wise and judicious.[6] And evidence of the conduct of an aged testator a long time after making his will, while he was gradually sinking, is entitled to but little weight.[7] Neither do slowness, feebleness, and eccentricity show insanity,[8] nor do eccentricity and nervousness;[9] nor do oddities and apparent weakness of mind, when they are attributable to the physical condition of and medicines taken by the testator;[10] nor arbitrary and capricious likes and dislikes.[11] Nor do eccentric and improper actions upon the part of a clergyman indicate it;[12] nor eccentricity combined with disbelief in specific religious doctrines,[13] or with profanity and filthy habits.[14] Nor is a will invalidated by eccentricity, combined with the fact that the testator gave his property to the general government, and that he had childish tastes, and had a habit of making wills and changing them.[15] And the fact

[1] Duffield v. Robeson, 2 Harr. (Del.) 375. And see Brock v. Luckett, 4 How. (Miss.) 459.

[2] Kingsley v. Blanchard, 66 Barb. 317.

[3] Re Lang's Estate, 65 Cal. 19.

[4] Aikin v. Weckerly, 19 Mich. 482.

[5] Boylan v. Meeker, 15 N. J. Eq. 310.

[6] Chandler v. Barrett, 21 La. Ann. 58.

[7] Kinne v. Kinne, 9 Conn. 102, 21 Am. Dec. 732.

[8] Banks v. Goodfellow, 22 L. T. N. S. 820.

[9] Mercer v. Kelso, 4 Gratt. 106; Rush v. Megee, 36 Ind. 69; Ekin v. McCracken, 11 Phila. 534.

[10] Frost v. Wheeler, 43 N. J. Eq. 573.

[11] Re Spencer's Estate, 96 Cal. 448; Rush v. Megee, 36 Ind. 69.

[12] Fulleck v. Allinson, 3 Hagg. Eccl. Rep. 527.

[13] Hartwell v. McMaster, 4 Redf. 393.

[14] Bennett v. Hibbert, 88 Iowa, 154.

[15] Re Merriam, 42 N. Y. S. R. 619.

that a testator was erratic and changeable and excitable has no tendency to prove testamentary incapacity,[1] though eccentricities and belief in absurdities furnish evidence of insanity.[2]

So, the fact that a testator was sixty-eight years old when he married and his wife about eighteen is not proof *per se* of insanity or imbecility;[3] nor is the fact that he was a white man and wished to marry a negro woman, or maintain unlawful relations with her;[4] nor is the fact that a testatrix was extremely penurious and miserly, and denied the necessities of life to herself and servants.[5] Nor is it established by frequent gifts, though unwise, where it appears that the larger ones were made to persons toward whom the testator felt gratitude and affection and regard.[6] And a determination by a father, whose daughter had married against his will, to make a deed instead of a will, giving his property to others, thus cutting down behind him the means of redress after his fury had passed, is not of itself evidence of unsoundness of mind.[7] Nor is incapacity established by the fact that the testator deemed his physician derelict in not informing him of the serious nature of his malady, and entertained the opinion that out-door air would be good for him, and muttered to himself when alone.[8] And where a testator knew what he was doing when he executed his will, loose declarations afterwards made should not be allowed to affect its validity.[9] Though acts and declarations showing that the testator was affectionate towards his relatives may tend to defeat a will giving the testator's property to a stranger, where there was proof of intention, as it would increase the probability that the will was the result of deliberate judgment.[10] So, evidence of profanity, irreverence, and disbelief in the existence of God, and filthy habits, does not show a mind wanting in testamentary capacity.[11]

[1] Prentis v. Bates, 88 Mich. 567.
[2] Leech v. Leech, 5 Pa. L. J. 86; Dew v. Clark, 3 Add. Eccl. Rep. 79.
[3] Thompson v. Stump, 62 Mo. 275.
[4] Patton v. Patton, 5 J. J. Marsh. 389.
[5] Newton v. Carbery, 5 Cranch, C. C. 626.
[6] Miller v. Oestrich, 157 Pa. 270.
[7] Lemon v. Jenkins, 48 Ga. 313, *dictum*.
[8] Spratt v. Spratt, 76 Mich. 384.
[9] Irvin v. Deschampo, 11 W. N. C. 335.
[10] Norris v. Sheppard, 20 Pa. 475.
[11] Bennett v. Hibbert, 88 Iowa, 154.

The fact that an aged testator failed to provide for his wife, however, and entertained visionary and unreasonable fears of damage and injury, and was disturbed and prostrated and talked and behaved strangely, furnishes evidence of want of capacity to execute a will.[1] And proof of a habit of writing illegibly and unintelligibly, calling the writings letters, and insisting upon having them sent to friends and acquaintances, furnishes positive proof of extreme imbecility if not idiocy.[2] So, in determining the mental condition of a testator, the conduct of the parties surrounding him is of as much influence as the opinions of witnesses given upon the trial.[3] But power to make a testamentary disposition under certain restrictions given by a father in his will to a semi-imbecile son, of the property given him by the will, furnishes no evidence of the testamentary capacity of the son.[4] And an agreement signed by the relatives of a testator several years before the will is made with reference to the care of his property, reciting his great age and incapacity to manage his property, is to be regarded as a mere expression of opinion at the time and not to be considered as evidence of mental incapacity with reference to the will.[5]

§ 35. *Suicide.*

The suicide of a testator is evidence tending to show want of testamentary capacity.[6] But it is not conclusive;[7] and does not even raise a presumption of insanity at the time of the execution of the will;[8] and is only to be considered as a circumstance in connection with others.[9] Suicide, together with all other facts in the case, should go to the jury for consideration in determin-

[1] Hoskins v. Hoskins (Ky.) 7 S. W. 546.

[2] Williams v. Lee, 47 Md. 321.

[3] Stebbins v. Hart, 4 Dem. 501.

[4] Re Alexander's Will, 27 N. J. Eq. 463.

[5] Dale's Appeal, 57 Conn. 127.

[6] Pettitt v. Pettitt, 4 Humph. 191; Re Card's Will, 28 N. Y. S. R. 528, 55 Hun, 607, mem; Duffield v. Morris, 2 Harr. (Del.) 375.

[7] Brooks v. Barrett, 7 Pick. 94; Pettitt v. Pettitt, 4 Humph. 191; McElwee v. Ferguson, 43 Md. 479.

[8] Bey's Succession, 46 La. Ann. 773, 24 L. R. A. 577; Re Card's Will, 28 N. Y. S. R. 528, 55 Hun. 607, mem; Duffield v. Morris, 2 Harr. (Del.) 375; Hoby v. Hoby, 1 Hagg. Eccl. Rep. 146.

[9] Re Card's Will, 28 N. Y. S. R. 528, 55 Hun. 607, mem.

ing the question of testamentary capacity, not as of the time of the commission of the suicide, but as of the time of the execution of the will.[1] A subsequent suicide will not affect the right of a will to probate where it was duly and properly executed;[2] or where it was reasonable and such as a man in his senses might be supposed to make;[3] or where instructions containing the fixed and final intentions of the testator had been given, and there was no evidence of insanity at the time of giving them, even though formal execution thereof was prevented by the suicide.[4] And the fact that a testator labored under an insane delusion on the three days preceding the execution of his will, and committed suicide on the day following its execution, while temporarily insane, is not sufficient to invalidate it where it was drawn entirely in his own writing and purported to have been signed by him in the presence of witnesses, and it was in itself a rational act rationally done.[5]

§ 36. *Change of character or disposition.*

A marked change in a man's habits and thoughts is strong evidence of his mental unsoundness, and the absence of such change is evidence to the contrary;[6] and insanity is indicated by proof of acts, declarations, and conduct inconsistent with the character and previous habits of the party.[7] Thus, the fact that one who had always been of a gentlemanly disposition became suddenly irritable, morose, and profane without provocation or cause tends to show mental derangement,[8] and evidence that a person who had been pleasant and amiable suddenly became irritable, morose, and slatternly in his habits and eccentric in conduct, and seemed to nourish a bitter feeling against his relatives without cause, and that he ran away and was subsequently found in an asylum, justifies a finding of insufficient testamentary capacity.[9] So, proof

[1] McElwee v. Ferguson, 43 Md. 479.
[2] Re Bailey, 7 Jur. N. S. 712.
[3] Levy v. Lindo, 3 Meriv. 85.
[4] Burrows v. Burrows, 1 Hagg. Eccl. Rep. 109.
[5] Chambers v. Queen's Proctor, 2 Curt. Eccl. Rep. 415.
[6] Re Carpenter, 79 Cal. 382.
[7] McCurry v. Hooper, 12 Ala. 823, 46 Am. Dec. 280; Groom v. Thomas, 2 Hagg. Eccl. Rep. 433.
[8] Conely v. McDonald, 40 Mich. 150.
[9] Pelamourges v. Clark, 9 Iowa, 1.

of a suddenly acquired idea upon the part of a husband, whose relations with his wife and family had always been pleasant, that they were persecuting him and trying to get his property from him, and had attempted to poison him and put him in an insane asylum, and that he subsequently killed his wife and himself, sufficiently establishes incompetency;[1] and evidence that a father suddenly conceived the idea that one whom he had treated as a son for thirty-five years was illegitimate, telling his confidential adviser so, under circumstances fairly justifying the inference that he made the statement in explanation of his purpose to disinherit him, tends to show the existence of an insane delusion at the time.[2] A codicil to a will, made while the testatrix was unquestionably sane, executed after signs of mental disturbance had appeared, including changes in her personal habits and a dislike for her niece, who was the beneficiary in her will, the sole purpose of which was to revoke the provision in her favor, should be refused probate as having been directed by an insane delusion,[3] and so should a will containing liberal provision for charitable and religious purposes, but omitting without apparent cause to make provisions for certain near relatives who had previously been generously provided for, where the sentiments of the testator had been in opposition to religious organizations.[4] Nor can the court suggest, as matter of law, a period of a designated number of days as a possible limit within which a radical change of mental condition could take place, where there was abundant testimony as to what the testator's actual condition was during such period.[5] The inquiry, however, is not as to whether there was good reason for the change, but as to whether it was caused by an insane delusion.[6] And proof of a miserly disposition, profanity, unclean modes of life, dishonesty even to theft, and violence of temper, which did not previously exist, do not show want of testamentary capacity.[7] Nor is it shown by evidence that

[1] Re Kahn, 24 N. Y. S. R. 409.
[2] Haines v. Hayden, 95 Mich. 332.
[3] Miller v. White, 5 Redf. 321.
[4] Re Frickie, N. Y. Daily Reg. Feb. 6, 1886 (Abb. Dig. 1886, p. 377).
[5] Reichenbach v. Ruddach, 127 Pa. 564.
[6] Re Carpenter's Estate, 94 Cal. 416.
[7] Re Lewis, 33 N. J. Eq. 219.

after the death of his wife the testator began to pay more attention to his dress and tried to look youthful, and took a decided interest in the opposite sex, not comporting with his former dignity, and lost interest in his business, and became forgetful and subject to fits of despondency, and suddenly commenced to drink to excess.[1] So, the fact that a testator was prompt and particular in the payment of his debts, and two of his trustees presented a large bill against his estate for services performed, has no tendency to prove him insane.[2] And evidence that a testatrix became estranged from her adopted son of whom she had been very fond, and refused to permit him to be known by her name, and destroyed her will and mutilated his portrait as a sign of her displeasure, and made baseless charges against him, does not establish testamentary incapacity.[3] So while ill will, prejudice, hatred, or the exhibition of violence by a person usually pleasant and affable do not of themselves constitute insanity, they may indicate mental derangement, and evidence of their existence with reference to persons actually entitled to the testator's bounty which might affect the disposition of his property should be left to the jury to determine whether they result from natural ungovernable passion or show the indication of a decaying or decayed mind.[4]

§ 37. *Advanced age and attendant defects.*

The advanced age of a testator is not alone sufficient to prove incapacity to make a will,[5] and raises no presumption against capacity.[6] And probate will not be refused because the testator was very old and the powers of his mind somewhat impaired, where there are no traces of fraud and the provisions of his will are consonant with the state of his affections.[7] Or, where it was

[1] Sanderson v. Sanderson, 52 N. J. Eq. 243.

[2] Fraser v. Jennison, 42 Mich. 206.

[3] Merrill v. Rolston, 5 Redf. 220.

[4] Sherley v. Sherley, 81 Ky. 240.

[5] Spencer v. Moore, 4 Cal. 423; Van Alst v. Hunter, 5 Johns. Ch. 148; Kerr v. Lunsford, 31 W. Va. 680, 2 L. R. A. 668; Nicholas v. Kershner, 20 W. Va. 251.

[6] Bleecker v. Lynch, 1 Bradf. 458; Cornwell v. Riker, 2 Dem. 354; Horn v. Pullman, 72 N. Y. 269.

[7] Carroll v. Norton, 3 Bradf. 291; Re Wheeler's Will, 56 N. Y. S. R. 709; Collins v. Townley, 21 N. J. Eq. 353.

entirely plain that he understood the will and knew the disposition he was making of his property.[1] Nor is impairment by age and mental strain and excitement alone sufficient.[2] Nor is old age combined with declining health, and the failure of the testator to recollect and understand certain transactions,[3] or with failing health or feebleness, and deafness,[4] or with defective eyesight, hearing, and memory.[5] Nor will old age and physical infirmities usually attending it invalidate a will though the disposition was unequal.[6] And a will by a testator able to recognize his attendants and visitors, and who remembered the existence of a former will and conversed intelligently in regard to a second one, and expressed satisfaction with it when read over, is valid though he was seventy years old and had had an epileptic attack a few days before making it.[7] Nor will age and great debility and the fact that the testator's mind was torpid and inactive invalidate his will where the defects seemed to be of sensibility rather than of intellect, and the making of the will was a subject in which he felt a particular interest and in which he carried out a long-cherished project.[8]

An instruction in a will contest, however, that mere physical weakness or disease, old age, eccentricity, blunted perception, weakened judgment, and failing memory or mind are not necessarily inconsistent with testamentary capacity, and that one's memory may be failing and his mind unsound and his mental powers weakened and he still have testamentary capacity, without reference to the significance of such facts as evidence, is objectionable as in effect a withdrawal of such evidence from the consideration of the jury.[9] And a will made by a testator of

[1] Re Snelling, 44 N. Y. S. R. 477; Lawrence v. Lawrence, 4 N. Y. Week. Dig. 299; Chrisman v. Chrisman, 16 Or. 127; Re Woodfall's Will, 7 Phila. 528; Taylor v. Kelly, 31 Ala. 59, 68 Am. Dec. 150; Lodge v. Lodge, 2 Houst. (Del.) 419.

[2] Lyons v. Van Riper, 26 N. J. Eq. 337.

[3] Clarke v. Davis, 1 Redf. 249; Creely v. Ostrander, 3 Bradf. 107; Montague v. Allan, 78 Va. 592.

[4] O'Connor v. Madison, 98 Mich. 183.

[5] Re Napfle's Estate, 134 Pa. 494.

[6] Kise v. Heath, 33 N. J. Eq. 239.

[7] Harris v. Betson, 28 N. J. Eq. 213.

[8] Watts v. Bullock, 1 Litt. 252.

[9] Richmond's Appeal, 59 Conn. 226.

great age and of impaired mind and memory ought not to be sustained unless it appears that the disposition emanated from free will, without the interposition of others, and accorded with intentions previously expressed or implied from family relations.[1] And old age and an enfeebled mind, combined with the fact that the testator failed to provide for his wife in his will and entertained unreasonable fears of loss and damage and was disturbed and prostrated, and talked strangely and purchased goods without asking the price, furnish evidence showing want of testamentary capacity.[2] As does forgetfulness combined with the fact that he was under the influence of a colored woman whom he had emancipated, yielding implicitly to all her wishes and having no mind or will of his own, and had lost all regard for the dictates of natural affection.[3] Nor will a codicil to a will executed by a very aged testator immediately before death be admitted to probate where the evidence of capacity was weak and came from questionable sources, and reprehensible acts had been concealed as far as possible.[4]

So, proof of loss of memory of recent occurrences by an aged testator is not alone sufficient to show testamentary incapacity.[5] Nor is forgetfulness combined with the fact that a testator at times labored under slight delusions,[6] or with lack of coherency in conversations, and childishness, and the fact that the testator had made different provisions from those contained in former wills.[7] And suggestions made to a testator at the time the will was made not to forget certain persons, though proper to be considered, do not warrant the jury in inferring that someone would have been forgotten but for such suggestions, thus raising an inference against capacity.[8] Nor will a failure of memory on the part of a testator nine months after making his will, evidenced by his statements that he had given his wife a part of his per-

[1] Re Ames, 51 Iowa, 596.
[2] Hoskins v. Hoskins (Ky.) 7 S. W. 546.
[3] Denton v. Franklin, 9 B. Mon. 28.
[4] Jones v. Goodrich, 5 Moore, P. C. 16.
[5] Re Eddy, 32 N. J. Eq. 701; Prentis v. Bates, 88 Mich. 567.
[6] Children's Aid Soc. v. Loveridge, 70 N. Y. 387.
[7] Re Clearwater, 17 N. Y. S. R. 794.
[8] Thornton v. Thornton, 39 Vt. 122.

sonal estate when he had not done so, be any criterion of the condition of his mind at the time of the execution of his will, where he was enfeebled by a severe illness at the time of making the statements.[1] And a defective memory combined with eccentricities and childishness and the fact that the will gave the property to the general government will not invalidate it where he was competent to manage a large property unaided and without waste or depreciation.[2] And evidence that the testator asked for money which had already been paid furnishes no ground for annulling his will.[3] And the fact that he bequeathed property which did not belong to him is a mere circumstance from which a state of mind unfavorable to capacity might be inferred, but which ought not to prevail against positive testimony showing competency.[4] Nor is testamentary incapacity shown by proof of old age and forgetfulness, combined with the fact that the testatrix had made an unjust and unfounded accusation against a person having no natural claim upon her, where she recollected and mentioned a large number of her grandchildren and understood the provisions of the will;[5] or combined with absent-mindedness and amorous remarks and profanity and abusiveness, where the will was prepared from directions given by testator when he possessed all of his faculties.[6]

So, ability to remember the names of relatives and to judge soundly of an act about to be done is not a legal test of testamentary capacity.[7] And the omission by a testator of a name of one of his eleven children in giving instructions for his will and mistakes in the names of some of the others do not furnish evidence of want of testamentary capacity.[8] Nor does a failure to remember the name of a grandchild.[9] Nor is imbecility established by failure of a testatrix to recognize a friend or relative at first view on a few occasions, and the fact that she busied herself

[1] Re Wintermute, 27 N. J. Eq. 447.
[2] Re Merriam, 42 N. Y. S. R. 619, Affirmed 136 N. Y. 58.
[3] Jackson v. Hardin, 83 Mo. 175.
[4] Marks v. Bryant, 4 Hen. & M. 91.
[5] Merrill v. Rush, 33 N. J. Eq. 537.
[6] Re Fow, 147 Pa. 264.
[7] Kramer v. Weinert, 81 Ala. 414.
[8] Re Wintermute, 27 N. J. Eq. 447.
[9] Martin v. Thayer, 37 W. Va. 38.

in making a collection of dolls and toys and arranging them just previous to a Christmas festival.[1] But the decision of a surrogate in refusing to probate a will will not be disturbed where the testator failed to recognize his children and inquired how many he had, and could only name a part of them, and the subscribing witnesses did not regard him as possessed of testamentary capacity.[2] And forgetfulness of neighbors and friends after receiving a hurt, and weeping upon being informed who they are, evidences a feeble intellect, and is strong evidence of mental disability when standing alone, but is also evidence of nervous excitement, and will not invalidate a will as against proof that the testator not only understood the matters of business he transacted but remembered them.[3]

§ 38. *Physical condition.*

Mere physical weakness is not evidence of insanity,[4] and a diseased bodily condition is not entitled to weight on the question of the validity of the will unless the bequests are extravagant or widely different from those which the situation of the testator and of his family would warrant.[5] Or unless there was some actual manifestation or development of irrationality.[6] Thus evidence of nervousness and its effects is not sufficient to show want of testamentary capacity,[7] though accompanied by physical weakness,[8] and though it be such as to cause the testator to become agitated or unconscious when attempting complicated business.[9] Nor is evidence of frequent sleeplessness, flightiness, or violent

[1] Watson v. Donnelly, 28 Barb. 653.

[2] Dumond v. Kiff, 7 Lans. 465.

[3] Reynolds v. Root, 62 Barb. 250.

For Dr. Clevenger's discussion on this subject, see *Age*, chap. xix.

[4] Rice v. Rice, 50 Mich. 448, 53 Mich. 432; Stoutenburgh v. Hopkins, 43 N. J. Eq. 577; Kimball v. Cuddy, 117 Ill. 213; Doyle's Estate, 7 Pa. Co. Ct. 657; Thompson v. Kyner, 65 Pa. 368.

[5] Clarke v. Sawyer, 3 Sandf. Ch. 352, Reversed on other grounds, 2 N. Y. 498.

[6] LaBau v. Vanderbilt, 3 Redf. 382. And see Re Lennig's Estate, 4 Pa. Dist. R. 94.

[7] Re Kerney's Estate, 148 Pa. 218.

[8] Hoban v. Campau, 52 Mich. 346.

[9] Kinleside v. Harrison, 2 Phillim. Eccl. Rep. 449.

outbursts of passion from the use of intoxicants and narcotics.[1] And the rule is the same where nervous excitement or apprehension of death is caused by the fact that the testator was about to undergo a dangerous surgical operation.[2] So, the mere fact that a testator suffered from paroxysms of severe headache, which were aggravated by despondency over financial losses, will not incapacitate him to make a will.[3] Nor does evidence that a testator had a sore leg show such infirmity as would tend to disqualify him.[4] And declarations by a dyspeptic that he had no stomach, or that his stomach was bad, is not evidence of mental incapacity.[5] Nor is testamentary incapacity established by the fact that the testatrix was deformed and had been so from infancy, and that owing to her condition she had never been sent to school, and had avoided strangers and had occasional fits, where her mind was not deformed or her affections benumbed.[6]

So, the fact that a testator was racked and tortured by pain which had reduced his physical and mental vigor will not affect the validity of his will where there was nothing to show irrationality or delusion.[7] Nor will it be affected by evidence of dangerous sickness and the approach of death and such weakness that the testator could only make his mark to his will with assistance, where the subscribing witnesses, both of whom were apparently disinterested, declared him to be rational.[8] And testimony of medical experts, based upon anterior observation, that the testator who was very sick could not have been competent, will not invalidate his will where it was not an unnatural one, and he was able to give instructions for its preparation and complete its execution.[9] So, evidence that the testator was in the last stages of consumption, and was compelled to continually struggle for

[1] McCullough's Will, 35 Pitts. L. J. 169, Affirmed in Keating's Appeal, 36 Pitts. L. J. 283.

[2] Re Linton's Appeal, 104 Pa. 228.

[3] Re Spellier's Estate, 2 Pa. Dist. R. 513.

[4] Thomas v. Stump, 62 Mo. 275.

[5] Prentis v. Bates, 88 Mich. 567, Affirmed 93 Mich. 234, 17 L. R. A. 494.

[6] Re Howard's Will, 5 T. B. Mon. 199.

[7] McMaster v. Scriven, 85 Wis. 162.

[8] Re Patterson's Will, 36 N. Y. S. R. 813.

[9] Re Connor's Will, 7 N. Y. Supp. 855.

breath, and that his strength was leaving him, is not sufficient to establish testamentary incapacity, though his physicians thought him delirious because he insisted that he was better.[1] And paralysis, however universal, does not always affect the mind equally with the body, and does not therefore show that the person afflicted could not have a disposing mind.[2] And the fact that a testator was stricken with paralysis and remained speechless does not show testamentary incapacity where his mind remained unimpaired.[3] Nor is a will made by a testator some time after having an epileptic convulsion invalid where when he recovered from such attacks his mind became clear and strong and his will was reasonable.[4] And such a will will be admitted to probate where there is nothing to show incapacity except during the continuance of the influence of the fit, though there is entire absence of proof of instructions or knowledge of contents, and the attesting witnesses could recollect nothing of the circumstances attending its execution.[5] Nor will an epileptic fit about five minutes after signing the will, after which the testator sank rapidly and died, and the opinion of the subscribing witnesses that the testator did not know what he was doing, invalidate it as against the testimony of the person who drew it, and who had no interest under it, that the testator fully comprehended its provisions.[6] And evidence that an aged testator had been subject to occasional fits of epilepsy for some years, which produced great prostration and enfeebled his mental energies and impaired his memory, and that he took large doses of laudanum to relieve his sufferings and was at times childish and incapable of much effort and failed to recognize acquaintances, will not invalidate his will as against proof of business capacity and that he attended to his own business and was apparently in perfect possession of his faculties at the time.[7] Nor will proof of general paresis and

[1] Ayres v. Ayres, 43 N. J. Eq. 565.

[2] M'Daniel's Will, 2 J. J. Marsh. 331.

[3] Rothrock v. Rothrock, 22 Or. 551. And see Re Gatley's Estate, 4 Pa. Dist. R. 52.

[4] Re Rapplee, 66 Hun, 558.

[5] Foot v. Stanton, 1 Deane & S. 19.

[6] Re Lewis's Will, 51 Wis. 101.

[7] Brown v. Torrey, 24 Barb. 583.

that the testator had been confined in an asylum, as against such evidence of business capacity.[1] Though evidence of the attending physician that the testatrix was not of sound mind and that she had chronic gastritis, which of itself weakens the mind, and that she was easily persuaded and would contradict herself, together with the evidence of friends that she was melancholy and nervous and a mental and physical wreck, is sufficient to entitle the contestants to have the question submitted to the jury.[2]

So, proof that opium was administered in moderate doses under directions of an attending physician to a testator during a protracted illness to alleviate pain will not invalidate a will made during such illness, in the absence of proof that it affected his mental powers further than to cause sleepiness or that he was at all affected by it at the time,[3] though in a few instances the testator had delusions;[4] and drowsiness and the fact that the testator appeared delirious a day or two before are not sufficient to establish incompetency to make a change in his will.[5] But a finding setting aside a will will not be disturbed on appeal where it appears that the testator was a bed-ridden invalid, subsisting mainly upon whisky and morphine, not taking the latter in quantities sufficient to affect him mentally, but which made him drowsy, and that he disinherited a daughter because of her desire to marry a man whom he did not like.[6] And evidence that the testator was in a state of chronic stupor at the time, from which he could be awakened but into which he would speedily relapse, the interval of his lucidity being too brief for any considerable mental exertion, and that he only wrote three letters to his name, which was finished by another, is sufficient to justify the cancelation of his will in the absence of evidence of a request to complete his signature.[7] Nor can a will be admitted to probate in the absence of evidence that the testator declared it to be his will or requested the witnesses to sign where the evidence tends to

[1] Re Kiedaisch, 2 Connoly, 438.
[2] Crockett v. Davis, 81 Md. 134.
[3] Re Glockner, 17 N. Y. S. R. 798.
[4] Miller v. Oestrich, 157 Pa. 264.
[5] Jackson v. Hardin, 83 Mo. 175.
[6] Carlin v. Baird, 11 Ky. L. Rep. 932.
[7] Knapp v. Reilly, 3 Dem. 427.

show that he was in a dazed and stupefied condition, taking no interest in anything that was going on, and wandering in his mind, and that he signed with his mark because he was too weak to write his name.[1] And probate will be refused where the testator's physical powers had so failed as not to be perceptible, and his flesh was cold and he was too weak to be lifted up to make his mark, and the evidence as to his intention was conflicting.[2]

The fact that a testator died within a few hours after making his will, however, is not alone sufficient to establish testamentary incapacity.[3] And occasional flightiness or wandering of intellect on the part of a testator during his last sickness immediately preceding his death furnishes very slight, if any, evidence that that state of mind continued so as to impair the validity of a will subsequently executed.[4] Nor is a will invalidated by evidence of physicians that the invariable effects of the disease with which the testator was afflicted upon the mind of the patient was to produce frenzy previous to death, where it does not appear that the state of frenzy had commenced at the time the will was executed, and there was evidence that he was in his right mind at the time.[5] Nor will the mere fact that a testator was affected by a disease of the brain producing occasional convulsions and partial paralysis, and that two of these convulsions actually occurred while he was dictating his will, be sufficient to invalidate it where they seem to have little or no effect upon his mind.[6]

An inference of testamentary capacity arising from an intelligent response to questions and intelligent questions upon the part of a testator at the time of making his will, however, is weakened, if not entirely overcome, by evidence that stimulants had been administered during several days to keep up his strength, and that he was failing rapidly, and that his hands and limbs were then cold, and he died a few hours later.[7] Nor will a will made by a testator on his death bed in favor of his wife to the exclu-

[1] Re Coop's Will, 24 N. Y. S. R. 417.
[2] Byard v. Conover, 39 N. J. Eq. 244.
[3] Jackson v. Jackson, 39 N. Y. 153.
[4] McMasters v. Blair, 29 Pa. 298.
[5] Berry v. Hamilton, 10 B. Mon. 129.
[6] Parramore v. Taylor, 11 Gratt. 220.
[7] Kingsley v. Blanchard, 66 Barb. 317.

sion of other members of his family be admitted to probate where he was of weak and impaired capacity from disease affecting the brain which produced torpor and rendered his mind incapable of exertion unless aroused, and the dispositions in the will were a total departure from his intentions previously expressed.[1] And a will made by a testator suffering from progressive paresis, when in a state of intermittent exaltation and depression denoting gradual transition to a state of absolute dementation immediately preceding death, leaving his wife but a small legacy and giving a reason therefor which was not true, will be held invalid.[2]

§ 39. *Hereditary insanity.*

Insanity which will invalidate a will cannot be established by proof of hereditary or constitutional insanity on the part of collateral kinsman.[3] And no presumption that a testator was insane arises from proof that his mother had been so, as against clear satisfactory proof of sanity.[4] But while evidence of hereditary insanity will not of itself make out a case it is admissible as tending to corroborate direct proof of insanity.[5] Though the insanity of a sister and niece does not tend to prove hereditary insanity where their malady was attributed to disease and its characteristics were in no respect similar to those in question in the case of the testator.[6]

§ 40. *Proof as to partial insanity and delusion.*

Proof of partial insanity of a testator to invalidate a will must be more clear and satisfactory than proof of general insanity.[7] And proof of the existence of a delusion and of its effect to invalidate a will must be more direct and full where the testator is generally sane and his will is reasonable on its face than is required in cases of alleged general insanity.[8] Precautions on the part of a testator to prevent any part of his estate from going to a divorced wife

[1] Harwood v. Baker, 3 Moore, P. C. 282.
[2] Re Loewenstine's Estate, 2 Misc. 323.
[3] Frere v. Peacocke, 3 Curt. Eccl. Rep. 664.
[4] Snow v. Benton, 28 Ill. 306.
[5] Smith v. Kramer, 5 Pa. L. J. 226.
[6] Prentis v. Bates, 88 Mich. 567, Affirmed 93 Mich. 234, 17 L. R. A. 494.
[7] Mullins v. Cottrell, 41 Miss. 291.
[8] Mullins v. Cottrell, 41 Miss. 291.

cannot be regarded as evidence of an insane delusion with reference to her wishes.[1] Nor are prejudice upon the part of a testator against some of his children, and unjust remarks against them unwarranted by the facts, sufficient to establish, as matter of law, that he has insane delusions or is devoid of testamentary capacity.[2] Nor is a mistaken statement of a testatrix that her grandson was not her son's child.[3] And evidence of an opinion held by a testator that his daughter had misused and mistreated him, and of a contrary opinion held by the daughter, is not sufficient to justify an instruction as to the effect of an insane delusion.[4] And a belief on the part of a woman that she had been treated unjustly and harshly, and that advantage had been taken of her by her brothers and sisters, in connection with evidence that she was a woman of arbitrary temper, ignorant, illiterate, suspicious, dull of comprehension, and had no business ideas and habits, and was difficult to get along with, does not show an insane delusion which will invalidate her will, though its dispositions might have been influenced by it.[5] Nor will mental unsoundness be inferred from an apparently causeless assertion by a testator that he had been robbed and was destitute.[6] And an opinion entertained by a testator that his rights as to the boundary lines between his land and that of his son were being infringed upon, and that his son was helping it along because he and other parties concerned were Masons, which opinion was unfounded, does not establish an insane delusion which will affect the validity of his will where he was irritated against his son and thought he had not treated him right, but is rather a case of unreasonable prejudice and perverse opinion.[7] Nor will proof that a testatrix on several occasions labored under the delusion that she was still living at a former residence in another street, and that on one occasion she used irrational language imagining that a conspiracy was in progress and that she heard voices, and said many things which were not

[1] Re Tracy's Will, 11 N. Y. S. R. 103.
[2] Schneider v. Manning, 121 Ill. 376.
[3] Re Spencer's Estate, 96 Cal. 448.
[4] Shorb v. Brubaker, 94 Ind. 165.
[5] Re Gross, 14 N. Y. S. R. 429.
[6] Rodger's Estate, 19 W. N. C. 383.
[7] Re White's Will, 121 N. Y. 406.

remembered, invalidate her will where her actions were accounted for in part by the fact that she drank ale, after the discontinuance of which such symptoms disappeared.[1] Nor will the will of an aged testatrix be invalidated by evidence that her physical powers were generally failing and that she was miserly at times, unclean in her habits, and that she was a believer in witchcraft and talked of buried treasures and other absurdities, and pretended to have had personal interviews with the Divinity and the evil one, and to have entered Heaven and conversed with its inhabitants, and expressed a desire to be robed like the angels, where she was prudent and sensible in the management of her household affairs and shrewd at a bargain, and the dispositions of her will were in accordance with natural claims upon her bounty.[2] But a will, though made by a person who was prudent and conducted herself like ordinary people in the ordinary affairs of life, has been held invalid where she believed herself to be a member of the Holy Trinity and in direct communication with God, and that she was above God and would sit in Judgment on her fellow creatures with her Creator on Judgment Day, and in other similar delusions, mistakenly believing that attempts had been made to poison her and that she was blind.[3]

So, a statement in a will that the testator had given a sum of money to his daughter, which is contradicted by her, is not sufficient to show that he labored under an insane delusion where there is evidence of an investment by him which might have been regarded as an investment for her husband and charged to her as such.[4] And a statement by a testator who had given his property to nieces to the exclusion of a supposed son, that he had no son, does not show an insane delusion which will invalidate his will where there was evidence that he was only an adopted son.[5] Nor will a mistaken belief on the part of a testator in the infidelity of his wife and the illegitimacy of his son, and that his brothers sought to poison him, show an insane delusion which will affect his will where the will itself was fair and reasonable

[1] Children's Aid Soc. v. Loveridge, 70 N. Y. 387.
[2] Re Vedder, 6 Dem. 92.
[3] Smith v. Tebbitt, L. R. 1 Prob. & Div. 401.
[4] Jackson v. Hardin, 83 Mo. 175.
[5] Re Ziegler, 47 N. Y. S. R. 491.

and it does not appear that his belief affected his conduct or its provisions.[1] And evidence that the testatrix sought to escape an imaginary robber, and had a delusion that her brother had killed seven men and cut them up and thrown them into a well, and that she destroyed her bed and clothing and believed that her son and a young lady had procured a large kettle with the purpose of boiling her in it, and that she became very miserly and had a fear of being poisoned by her son, does not show a state of habitual insanity which will shift the burden of proof that her will was made during a lucid interval, where such actions were far apart and remote from the will.[2]

Delusive ideas, however, which ought to receive their condemnation and expulsion at once from the simple action of the senses, and those opposed to the simple, ordinary, and universal action of reason in healthy minds, are of themselves proof of insanity.[3] And a delusion, though insufficient to establish testamentary incapacity, is proper to be considered with reference to the question of mental weakness.[4] And evidence of insane jealousy on the part of a husband whose wife was a woman of good repute, and that he frequently denied the paternity of his children and abused her in a most inhuman manner and finally shot her and then committed suicide, is sufficient to show unsoundness of mind which will invalidate his will.[5] So, in determining as to the continual existence of a delusion, the contents of the will and the circumstances deemed to warrant its execution will be taken into consideration.[6] And the mere nonmanifestation of a delusion proved to have previously existed, at any particular time, will not show its nonexistence.[7] And the will of a testator who about two months previous had had an illness which affected his mind, after which he became better and conducted himself rationally, made at about the time of a return of the symptoms of mental disease which took the form of an uncontrollable idea

[1] Re Cole's Will, 49 Wis. 179.
[2] Chandler v. Barrett, 21 La. Ann. 58, 99 Am. Dec. 701.
[3] Smith v. Tebbitt, L. R. 1 Prob. & Div. 401.
[4] Re Storey's Will, 20 Ill. App. 183.
[5] Burkhart v. Gladish, 123 Ind. 338.
[6] Broughton v. Knight, L. R. 3 Prob. & Div. 64.
[7] Grimani v. Draper, 6 Notes of Cases, 418.

that he must be eternally damned for having received communion unworthily, after which he was pronounced insane by a medical board and died in a lunatic asylum, will not be admitted to probate, though it was sensible and contained no indications of having been affected by his delusion.[1] So, a codicil subsequently made by an old man in favor of a young woman whom he desired to marry at first sight when he was unquestionably insane and of whom he had no former knowledge, is invalid as having been made under the influence of an insane delusion.[2]

§ 41. *Proof of undue influence or fraud and incapacity.*

The jury may take into consideration the condition of the testator's mind at the time of executing his will in determining the question of fraud and undue influence in connection with the relative situation of the testator and the beneficiaries under the will, and the testator's surroundings and condition and the nature and extent of his property, and all the circumstances under which the will was made, as well as the provisions of the will itself.[3] And much less evidence is required to invalidate a will on the ground of undue influence when it is doubtful whether the testator was sane than if he was in full possession of all his faculties.[4] But mere weakness of intellect does not establish undue influence, though a person of weak intellect may more readily become the victim of improper influence; there must be some evidence of influence aside from weakness of intellect.[5] And the physical condition and age of a testator, taken separately from the condition of his mind and memory, are not proper to be considered in determining the existence of undue influence;[6] though a less degree of proof of mental incapacity and undue influence is necessary in case of a very old person.[7] Neither is the operation of undue influence established by trivial and inconsequent declarations of the testator and slight evidence of mental impairment where the evidence was overwhelming that he re-

[1] Symes v. Green, 1 Swab. & T. 401, 5 Jur. N. S. 742.
[2] Clarke v. Lear, cited in 1 Phillim. Eccl. Rep. 119.
[3] Richenbach v. Ruddach, 127 Pa. 564.
[4] Dennis v. Weekes, 46 Ga. 514; Kates' Estate, 16 W. N. C. 100.
[5] Reynolds v. Root, 62 Barb. 250; Thompson v. Kyner, 65 Pa. 368.
[6] Muir v. Miller, 72 Iowa, 585.
[7] Smith v. Smith, 60 Wis. 329.

tained business capacity, especially where such declarations were made several years after the will was executed.[1] And an instruction that the fact that the testatrix may have had spells of disease which affected her mind will not invalidate her will if she had mind and memory sufficient to make it at the time, and was not unduly influenced to make it, is not objectionable as confining the undue influence which would invalidate the will to the very moment it was signed.[2] So, influence reached only by a uniform course of kind treatment in connection with the single fact of weakness of mind raises no presumption of invalidity against a will.[3]

The fact that a person acting as the spiritual advisor of the testator, however, takes advantage of the situation to become the agent and manager of his temporal affairs, and, acting in both capacities, becomes a donee of large gifts under his will, furnishes strong evidence of undue influence.[4] And evidence of weakness and imbecility from age and disease incapacitating a testator from attending to his ordinary business, and that he was induced to abandon attorneys previously employed and employ the attorney for the principal devisee to draw his will, which was witnessed by such attorney and the wife and a relative of the devisee, when disinterested witnesses were near at hand, should be considered by the jury in determining as to the existence of undue influence.[5] Nor will a will be admitted to probate where there was evidence of some degree of mental incapacity, and that it was obtained from the testator while dying, by the personal suggestion and importunity of the person who wrote the will and procured its execution, under which she and her relations took a large benefit, and that the testator never spoke afterwards.[6] And a will should be refused probate on the ground of undue influence exercised upon an enfeebled mind where the weight of evidence was against the testator's soundness and the property was given to a church and the only persons who knew of the preparation of the will were

[1] Herster v. Herster, 122 Pa. 239.
[2] Overall v. Bland, 11 Ky. L. Rep. 371.
[3] Re Wood's Estate, 13 Phila. 236.
[4] Middleton v. Sherburne, 4 Younge & C. 358.
[5] Jenkins v. Tobin, 31 Ark. 306.
[6] Tribbe v. Tribbe, 13 Jur. 793.

the clergyman and council of the church, and it appeared that when sane the testator evinced a dislike for the church and expressed affection for his wife, for whom no adequate provision was made.[1] And proof that if a will was signed by the testator it was done in haste without the knowledge of anyone but the subscribing witnesses, and of bad character on the part of the writer who was one of the witnesses, his wife and young son being the others, and that the same writer and the same witnesses had prepared and attested a former will when the testator was confessedly insane, are circumstances against the authenticity of the will.[2]

§ 42. *Proof of knowledge, capacity, and intent.*

The general rule is that where the capacity of a testator is doubtful at the time of the execution of his will there must be proof of instructions or of knowledge of the contents and of his intent to make the dispositions therein provided for.[3] And this is especially the case where the will is drawn or procured through the agent or principal legatee or a party interested.[4] And the fact that a testator is extremely old, imbecile in mind, and surrounded by interested parties and incapable of reading or writing renders proof of knowledge of the contents of his will indispensable.[5] And proof of intent and free will is necessary though he was not legally incompetent to make a will and though the instructions were given by him, especially where he was so situated that they might have been procured by undue influence.[6] Thus, a provision appointing the person who conducted the whole transaction, and to whom the testator looked to show him where to sign, executor of the will, and making him a residuary legatee,

[1] Re Forman's Will, 1 Tucker (N. Y.) 205.

[2] Carrico v. Neal, 1 Dana, 163.

[3] Tomkins v. Tomkins, 1 Bail. L. 92, 19 Am. Dec. 656; McSorley v. McSorley, 2 Bradf. 188; Billinghurst v. Vicars, 1 Phillim. Eccl. Rep. 199. And see Burger v. Hill, 1 Bradf. 360.

[4] Renn v. Samos, 33 Tex. 760; Billinghurst v. Vicars, 1 Phillim. Eccl. Rep. 199; Mitchell v. Thomas, 6 Moore, P. C. 137, 12 Jur. 967; Mackenzie v. Handasyde, 2 Hagg. Eccl. Rep. 211. And see Wilson v. Mitchell, 101 Pa. 495.

[5] Key v. Holloway, 7 Baxt. 576; Hyatt v. Lunnin, 1 Dem. 14.

[6] Mowry v. Silber, 2 Bradf. 133.

will not be upheld where there was no reading over or explanation.[1] And a codicil varying the bequests contained in the original will to the advantage of the drawer, executed when the testator's capacity was doubtful, will not be admitted to probate in the absence of proof of knowledge of its contents.[2] And the clearest and most consistent evidence of capacity and volition is required where the codicil was made within ten days of the testator's death when in a state of extreme debility, and all his confidential friends were excluded, and those about him were engaged in the execution of the will, and it made bequests irreconcilable with his character and intentions as proved by his affections and former testamentary disposition.[3] Nor will one prepared by a solicitor in his own favor when the testator was of fluctuating capacity be held valid where the court is not satisfied that he understood the contents and intended it to become operative, though no fraud is imputed to the solicitor.[4] A will thus drawn or procured from a testator of questionable capacity without evidence as to circumstances attending its execution,[5] or when he was of advanced age and weakened powers,[6] suggests suspicion and creates the necessity for a careful scrutiny into the facts, requiring the court to proceed with caution and circumspection and inquire whether the contents of the instrument harmonize with the state of the testator's affections and intentions.[7] And a will will not be held valid unless the suspicion is removed.[8] The presumption of law is against a will made by a testator of uncertain capacity which was prepared by a legatee in his own favor, and the burden of showing that it was voluntary and understood by the testator rests with the party claiming under it.[9] And the same rule applies to a codicil reducing provisions for certain beneficiaries under the original will, and giving the residue, which was the

[1] Billinghurst v. Vicars, 1 Phillim. Eccl. Rep. 199.

[2] Mitchell v. Thomas, 6 Moore, P. C. 137, 12 Jur. 967, 5 Notes of Cases, 600.

[3] Brydges v. King, 1 Hagg. Eccl. Rep. 256.

[4] Croft v. Day, 1 Curt. Eccl. Rep. 782.

[5] Whelpley v. Loder, 1 Dem. 368.

[6] Weir v. Fitzgerald, 2 Bradf. 42.

[7] Gombault v. Public Administrator, 4 Bradf. 226.

[8] Barry v. Butlin, 1 Curt. Eccl. Rep. 637.

[9] Harvey v. Sullens, 46 Mo. 147, 2 Am. Rep. 491.

largest part of the estate, to the party preparing it.[1] And weakness of mind on the part of a testator, though not sufficient to create testamentary incapacity, and the fact that the person under whose advice the will was prepared receives a large benefit under it, cast the burden upon such person of showing affirmatively that the testator had a full understanding of the nature of the dispositions contained in it and acted voluntarily.[2] So, the proof of knowledge of contents and approval to meet and overcome the burden of proof thus imposed must be strong and satisfactory.[3] Mere proof of execution of the will is not sufficient.[4]

The fact that a legatee in a will prepared it, however, does not in all cases and under all circumstances create a presumption that the testator did not know of or assent to its contents and compel the adduction of additional evidence of knowledge and consent.[5] The rule that where capacity is doubtful there must be proof of instructions applies with any degree of stringency only where the instrument is inofficious and obtained from parties whom it purports materially to benefit.[6] And a will in accordance with previous intentions will be admitted to probate though prepared from instructions by an interested party and not read to the testator, and though made in favor of strangers.[7] And the presumption arising where a stranger prepares a will under which he receives a large legacy does not apply where the party preparing it was a near relative who would have inherited a large portion of the estate had the testator died intestate.[8] Thus, a will signed by a testatrix in the presence of witnesses is entitled to probate though she was aged and infirm and it was drawn by her nephew who was her medical attendant and by it he took nearly all her property and he alone deposed to her knowledge of the

[1] Yardley v. Cuthbertson, 108 Pa. 395, 56 Am. Rep. 218.

[2] Caldwell v. Anderson, 104 Pa. 199; Cuthbertson's Appeal, 97 Pa. 163.

[3] McKnight v. Wright, 12 Rich. L. 232; McDaniel v. Crosby, 19 Ark. 533; Butlin v. Barry, 1 Curt. Eccl. Rep. 614; Durnell v. Corfield, 8 Jur. 915.

[4] McKnight v. Wright, 12 Rich. L. 232.

[5] Cramer v. Crumbaugh, 3 Md. 491; Bonner v. Matthews, cited in Shelford on Lunacy, 327.

[6] Brogden v. Brown, 2 Add. Eccl. Rep. 441.

[7] Goodacre v. Smith, 15 Week. Rep. 561.

[8] Caldwell v. Anderson, 104 Pa. 199.

contents.[1] And a will making provisions for the testator's wife and two children, one of whom was illegitimate, made upon instructions given by the testator's brother, who was one of the executors, will be held valid where it appears that the brother had done all in his power for the benefit of the illegitimate child, though the evidence as to capability and knowledge of contents was very slight.[2]

So, evidence that power had been exercised over a testator of weak mind, though not sufficiently so as to destroy testamentary capacity, by a party standing in a confidential relation to him, who receives a considerable portion of his estate, raises a presumption of fraud which requires more to rebut it than mere proof of the formal execution of the will in the presence of witnesses. There must also be evidence of free will,[3] and of soundness of mind,[4] and knowledge of the contents.[5] And the burden rests with the party seeking to sustain an unequal will executed by a person weak in mind and body at the house of the person most largely benefited, the execution of which was not communicated to his children and the provisions of which were not in harmony with his previously expressed intentions, to show that precautions were taken and explanations made so as to secure the full and free action of his faculties.[6] No definite rule as to the amount of mental capacity which will impose the duty of explanation upon a beneficiary can be laid down.[7] But very strong evidence is required to sustain a will made by an old woman who had been previously judicially found to be a lunatic without lucid intervals, while in the house and under the control of her committee, giving the bulk of her property to himself and wife.[8] And a will of an elderly woman whose mind was weak but not imbecile or idiotic, in favor of a woman with whom she lodged and boarded, who was a person of strong understanding and impe-

[1] Reece v. Pressey, 2 Jur. N. S. 380.
[2] Re Field, 3 Curt. Eccl. Rep. 754.
[3] Boyd v. Boyd, 66 Pa. 283; Breed v. Pratt, 18 Pick. 115.
[4] Morrison v. Smith, 3 Bradf. 209.
[5] Yardley v. Cuthbertson, 108 Pa. 395; Breed v. Pratt, 18 Pick. 115.
[6] Mowry v. Silber, 2 Bradf. 133.
[7] Yardley v. Cuthbertson, 108 Pa. 395.
[8] Murdy's Appeal, 23 W. N. C. 124; Hazlitt's Will, 35 Pitts. L. J. 503.

rious disposition and had gained an ascendency over her, will not be admitted to probate where there are discrepancies in the evidence respecting its execution.[1] Nor is mere evidence of the execution of a will and codicil by a person of weak mind, appointing his attorney and agent sole executor and making him legatee of a large property, and instructions therefor given to the solicitor by his father who was also the testator's attorney, sufficient without proof of instructions by the testator to the father.[2] And probate will be refused, even though instructions were given, where the testator was in a very weak condition of mind and his testamentary dispositions in favor of his wife had been varied in favor of a person who had acquired influence over him and expressed an intention to obtain his property.[3]

The mere fact that a testatrix's legal advisor who wrote her will was made her executor, however, is not sufficient to cast the burden of proving testamentary capacity upon the proponent where probate is applied for some time after her death.[4] And where proof of capacity, volition, and free agency is strong and corroborated by the testator's affections, declarations, and recognitions, the fact that the drawer of the will had been his attorney and the existence of slight discrepancies in the evidence as to execution are not material.[5] Nor will the fact that the solicitor who drew the will took a considerable legacy to the exclusion of an only son invalidate it, where the persons to whom the testator gave his property were those with whom he had associated most of his life, and he procured the preparation of the will himself, and there was nothing to show importunity.[6] And a gift to a legal adviser of one eighth of the testator's estate and the residue in trust for certain relatives is not sufficient to shift the burden of proof from the party alleging fraud and undue influence.[7] So, the fact that the beneficiaries in a will occupy the house of the tes-

[1] Cockraft v. Rawles, 4 Notes of Cases, 237.
[2] Ingram v. Wyatt, 1 Hagg. Eccl. Rep. 384.
[3] Darley v. Darley, 3 Bradf. 481.
[4] Linton's Appeal, 104 Pa. 228.
[5] Bird v. Bird, 2 Hagg. Eccl. Rep. 142.
[6] Barry v. Butlin, 1 Curt. Eccl. Rep. 637; Butlin v. Barry, 1 Curt. Eccl. Rep. 614.
[7] Stokes v. Miller, 10 W. N. C. 241.

tatrix and were caring for her and nursing her in her illness does not make their relation to her a fiduciary one which will cast upon them the burden of vindicating her will against the imputation that it was procured by fraud or undue influence.[1]

Proof of knowledge of the contents of a will and of intention may be made either by the subscribing witnesses or other persons.[2] And proof of instructions for a will or of reading it over to the testator is not indispensable, as knowledge of its contents may be established by evidence of knowledge and assent to the dispositions contained in it.[3] The nature of a will as to simplicity or complexity is material to be considered on the question of the knowledge of the testator of its contents where his capacity is questioned and the party who drew it takes a benefit under it.[4] And where a will was not explained to the testator, and the mere reading of it would not convey to a man in his physical and mental condition and with his limited education what was included within its comprehensive terms, it will be held invalid.[5] And though a will originally valid cannot be affected by subsequent instruments short of an express revocation, they may reflect back upon it, where the testator's capacity was questioned and the drawer of the will took an interest under it, and tend to elucidate the question whether or not the testator knew and approved of its contents.[6] Evidence that the testator intended that what was left after three annuities in his will were provided for should go to the executors, but that he believed this to be a small amount when in reality it was large, is not sufficient to establish knowledge on his part of the contents of his will and of assent to its provisions.[7]

§ 43. *Unexecuted and nuncupative wills.*

Wills of personalty when corresponding to long-entertained intentions upon the part of a testator have been held valid as

[1] McMaster v. Scriven, 85 Wis. 162.
[2] Key v. Holloway, 7 Baxt. 576.
[3] McNinch v. Charles, 2 Rich. L. 229.
[4] Durnell v. Corfield, 8 Jur. 915.
[5] Freeman v. Freeman, 19 Ont. Rep. 141.
[6] Durnell v. Corfield, 8 Jur. 915.
[7] Durling v. Loveland, 2 Curt. Eccl. Rep. 225.

unexecuted papers, where execution was delayed for want of witnesses or otherwise until insanity intervened.[1] And such insanity will not reflect back on previous eccentricities so as to invalidate the will.[2] A will of a person whose physical condition was such that she could not write is good as an unexecuted paper where it was drawn from her instructions and read over to and approved by her.[3] But in order to render a will effectual which was not signed the cause which prevented the signing where the testator knew how to write must have been a physical and not a mental one.[4] Unexecuted instruments changing the whole plan of a testator's testamentary dispositions will not be upheld unless it appears that the change of intention was most distinctly ascertained so that there could be no doubt of his meaning, or unless his capacity be clearly proved.[5] So, the testamentary capacity and intent of a testator at the time of making a nuncupative will must appear by the clearest and most undisputable testimony.[6] And it must appear that it contains at least the true substance and import of the declarations made by him.[7] Where a will is made by interrogatories the court will be more strict in requiring proof of volition and testamentary capacity than in an ordinary case.[8]

§ 44. *Proof of lucid intervals.*

The evidence in support of an allegation of a lucid interval after derangement should be as strong and demonstrative as where the object of the proof is to establish derangement;[9] and should go to the state and habit of the person, and not to an accidental interview with the individual, or to the degree of self possession

[1] Fulleck v. Allinson, 3 Hagg. Eccl. Rep. 527; Hoby v. Hoby, 1 Hagg. Eccl. Rep. 146.

[2] Hoby v. Hoby, 1 Hagg. Eccl. Rep. 146.

[3] Martin v. Wotton, 1 Lee, Eccl. Rep. 130.

[4] Jackson v. Moore, 14 La. Ann. 209.

[5] Wood v. Wood, 1 Phillim. Eccl. Rep. 357.

[6] Dorsey v. Sheppard, 12 Gill & J. 192; Re Yarnall's Will, 4 Rawle, 46; Blewitt v. Blewitt, 4 Hagg. Eccl. Rep. 410.

[7] Re Yarnall's Will, 4 Rawle, 46.

[8] Dorsey v. Sheppard, 12 Gill & J. 192.

[9] Attorney General v. Parnther, 3 Bro. Ch. 441; Pike v. Pike, 104 Ala. 642; Ricketts v. Joliff, 62 Miss. 441; Hall v. Warren, 9 Ves. Jr. 606.

demonstrated in a particular act.[1] Stronger proof of lucidity is necessary in cases of general insanity, in order to uphold a will, than in cases of insanity of a fluctuating or temporary character.[2] And lucid intervals are much more easily proved in cases of delirium than in cases of fixed mental derangement or permanent mental insanity.[3]

The nature and character of a will and of its dispositions have great influence in determining whether or not it was executed during a lucid interval.[4] A rational act rationally done is the best proof of a lucid interval.[5] The fact that a will made by a person afflicted with insanity having intermissions was a rational one and made in a rational manner is strong evidence, though not conclusive.[6] So, a will written by a lunatic without a mistake and in a natural manner, the provisions of which are sensible, proper, and judicious, shows the existence of a lucid interval at the time it was written,[7] imposing upon those who attack it the burden of proving insanity at the moment it was made.[8] And a lucid interval is established by proof of a will written by the testator which was proper and natural and conformable to his affections, and which was subsequently recognized by him during a lucid interval, though he was at times so violent as to render it necessary to tie his hands,[9] as well as by the fact that the will corresponded with a former testamentary instrument made while the testator was unquestionably sane, and with the state of his affections,[10] or with declarations as to his intention made while sane.[11] And a will of very simple contents, which is rational and

[1] Attorney General v. Parnther, 3 Bro. Ch. 441; Ricketts v. Joliff, 62 Miss. 441.

[2] Duffield v. Robeson, 2 Harr. (Del.) 375.

[3] Brogden v. Brown, 2 Add. Eccl. Rep. 441.

[4] Gombault v. Public Administrator, 4 Bradf. 226.

[5] Cartwright v. Cartwright, 1 Phillim. Eccl. Rep. 90.

[6] Nichols v. Binns, 1 Swab. & T. 239.

[7] Re Weir's Will, 9 Dana, 434; Cartwright v. Cartwright, 1 Phillim. Eccl. Rep. 90.

[8] Kingsbury v. Whittaker, 2 La. Ann. 1055, 36 Am. Rep. 278; Re Bey's Succession, 46 La. Ann. 773, 24 L. R. A. 577.

[9] Cartwright v. Cartwright, 1 Phillim. Eccl. Rep. 90.

[10] Dimes v. Dimes, 10 Moore, P. C. 422.

[11] Re Coghlan, cited in 19 Ves. Jr. 508.

natural and officious under the circumstances of the case, may be admitted to probate as having been made during a lucid interval, though the testator had been confined in an asylum and was afterwards again so confined, where he remained until his death, and he was afterwards found upon inquisition to be insane without lucid intervals for a period covering the date of the will.[1] So, fluctuating capacity will be inferred from a contradictory opinion as to capacity, particularly where the facts show that the testator was occasionally capable.[2] And evidence of softening of the brain of a testator, which finally culminates in his death shortly after the execution of his will, and of severe nervous prostration at times, during which his intellect was feeble and his memory largely gone, does not negative testamentary capacity where there were intervals between such attacks in which his mind was reasonably clear, during one of which the will was executed, and it was simple and reasonable in its provisions.[3] So, consciousness and admission of the party himself that he has been disordered in mind are among the strongest proofs of re-established faculties.[4] And proof that a will was made during a lucid interval is sufficient to shift the burden of proof to the contestants to show testamentary incapacity at the time of execution, though the testator had been found a lunatic by inquisition.[5]

Infirmity of mind after derangement, however, is evidence tending to show that the disorder has not been entirely rooted out.[6] And the will of a person who had been insane, but who for the interval of a month acted like a sane man, after which he became depressed as to his religious condition, executed during that time, will be held invalid where the attesting witnesses did not deem him competent, though it was in his own handwriting and perfectly rational.[7] So, evidence of sanity before and after the day on which a will is made by a testator generally insane is not sufficient to establish a lucid interval at that time.[8] But such evi-

[1] Bannatyne v. Bannatyne, 16 Jur. 864, 14 Eng. L. & Eq. 581.
[2] Williams v. Goude, 1 Hagg. Eccl. Rep. 577.
[3] Re Silverthorn's Will, 68 Wis. 372.
[4] Hoby v. Hoby, 1 Hagg. Eccl. Rep. 146.
[5] Mifflin v. Smedley, 3 Del. Co. Rep. 143.
[6] Attorney General v. Parnther, 3 Bro. Ch. 441.
[7] Symes v. Green, 5 Jur. N. S. 742, 1 Swab. & T. 401.
[8] Harden v. Hays, 9 Pa. 151.

dence in connection with proof that there were no irrational signs at the time, and that the disposition therein made was in harmony with the testator's previous declarations, is sufficient.[1] And proof of calmness on the part of a testator, and of his transacting matters of business under the sanction of his family, is not sufficient to rebut the presumption against his will arising from the fact that he had been insane, and from evidence of delusion and other indications of derangement existing shortly before the will was made.[2]

§ 45. *Revocation of wills.*

The destruction of a will by a lunatic testator does not amount to a revocation thereof,[3] as the intent with which he does it is but an insane intent which does not constitute an element of revocation.[4] And its contents may be proved in the same manner as other facts are established.[5] Thus, a will duly executed, which was torn to pieces by the testator while delirious, is not revoked but may be carried into effect, where the pieces were preserved, and where upon recovery and learning what he had done he determined to make a fresh will but never carried out his intentions.[6] And an unexecuted draft of a will may be admitted to probate where the will itself was destroyed by the testator while of unsound mind, after which he recovered and gave directions for the preparation of another will to the same effect, but killed himself before its completion.[7] So, a will partially defaced by a testator while insane will be probated as it existed in its integral state, if that is ascertainable.[8] And probate of a will in its original state will be granted where an alteration had been made while the testator was of unsound mind.[9] And where it appears

[1] Gombault v. Public Administrator, 4 Bradf. 226.

[2] Groom v. Thomas, 2 Hagg. Eccl. Rep. 433.

[3] Re Lang's Estate, 65 Cal. 19; Forbing v. Weber, 99 Ind. 588; Smith v. Waite, 4 Barb. 28; Re Forman's Will, 1 Tucker (N. Y.) 205; Dominick v. Dominick, 10 N. Y. S. R. 32; Ford v. Ford, 7 Humph. 92.

Re Lang's Estate, 65 Cal. 19; Smith v. Waite, 4 Barb. 28.

[5] Ford v. Ford, 7 Humph. 92.

[6] Brunt v. Brunt, L. R. 3 Prob. & Div. 37.

[7] Re Downer, 1 Eccl. & Adm. 106, 26 Eng. L. & Eq. 600.

[8] Scruby v. Fordham, 1 Add. Eccl. Rep. 74; Borlase v. Borlase, 4 Notes of Cases, 106.

[9] Re Bicknell, 3 Add. Eccl. Rep. 231.

that a testator was wanting in testamentary capacity at the time of the execution of the will which revoked a preceding one, an issue as to testamentary capacity at the time of the execution of the preceding will should be awarded.[1] Nor can a codicil be regarded as effective as a revocation of a former will where it is void as an affirmative testamentary disposition because of insufficient mental capacity of the testator.[2] And subsequent revocation of a will made while the testator was unquestionably sane, without any evidence of a change of purpose or of any ground for a change, after he had shown signs of breaking down mentally, may be attributed to mental delusion.[3]

One who is mentally incompetent to make a will is equally so to revoke a will previously made.[4] The revocation of a will requires the same degree of mental capacity as is required to make one.[5] And the destruction of a will does not constitute a revocation unless at the time the testator had capacity to understand the nature and effect of the act and perform it or direct its performance freely and voluntarily with intent to effect a revocation.[6] But a testator is competent to revoke his will, though he was weak and approaching his end and wandering in his mind, where he was easily restored to his normal condition and understood the disposition the law would make in the absence of a will, and intended to adopt it, and had no settled and irradicable delusions and no antipathy toward any legatee or beneficiary and no delusion touching the subject of any testamentary matter.[7] The rationality of a testator at the time of defacing his will is to be inferred from the rationality of his act, where there is nothing to evidence it *aliunde*.[8] And a will produced for probate with the signature of the testator torn off as if with a set purpose and deliberation raises a presumption that it was purposely revoked,

[1] Re Thomas's Estate, 20 W. N. C. 336.
[2] Delafield v. Parish, 25 N. Y. 9.
[3] Miller v. White, 5 Redf. 321.
[4] Smith v. Waite, 4 Barb. 28.
[5] Allison v. Allison, 7 Dana, 94; McIntire v. Worthington, 68 Md. 203.
[6] Rhodes v. Vinson, 9 Gill, 169, 52 Am. Dec. 685; Re Forman's Will, 54 Barb. 279, 1 Tucker (N. Y.) 205.
[7] Re Jones, 2 Ohio Dec. 409. And see Laing v. Bruce, 1 Dunlop, 53.
[8] Scruby v. Fordham, 1 Add. Eccl. Rep. 74.

and that he had capacity to revoke it at the time.[1] But where a will is found to have been drawn by the testator, and it was in his custody at a time when he was of unsound mind as well as of sound mind the burden of showing that it was not done after he became insane and therefore that it amounted to a revocation, rests with the party asserting such revocation.[2] A commission of lunacy against a testator does not work a revocation of a will made when he was of sound mind.[3] But whatever a testator who has since been impeached as insane may do in the way of the destruction or cancelation of his will the presumption of revocation does not follow, and the burden of showing it would rest with the party claiming a revocation to prove a lucid interval.[4]

VI. Gifts.

§ 1. *Inter vivos.*

The degree of capacity necessary to make a valid gift is the same as that required to make a contract or deed.[5] A higher degree of capacity is required than that necessary for the making of a valid will.[6] One who is conscious of his acts and understands their nature and effect is mentally competent to make a gift.[7] And a gift by a father to a son who had occasionally performed services for him without charge is valid if made while the donor had sufficient mental capacity to understand the transaction, though he had not sufficient capacity to transact business generally,[8] and though he was insane shortly before and afterwards from the violence of the disease.[9] And the fact that a donor was in a declining state of health and his understanding greatly weakened does not necessarily imply an absence of sufficient capacity to dispose of his property by gift;[10] though a

[1] Re Jones, 2 Ohio Dec. 409.
[2] Harris v. Berrall, 1 Swab. & T. 153.
[3] Hughes v. Hughes, 2 Munf. 209.
[4] Re Jones, 2 Ohio Dec. 409.
[5] Crum v. Thornley, 47 Ill. 192.
[6] Lemon v. Jenkins, 48 Ga. 313. And see Clarke v. Sawyer, 3 Sandf. Ch. 351.
[7] Richardson v. Smart, 2 Mo. App. Rep. 1107.
[8] Van Deusen v. Rowley, 8 N. Y. 358.
[9] Richardson v. Smart, 2 Mo. App. Rep. 1107.
[10] Ralston v. Turpin, 129 U. S. 663, 32 L. ed. 747.

voluntary conveyance by a person of weak understanding may be avoided though he is not a lunatic.[1] Prior idiocy or imbecility, however, need not be shown to invalidate a gift; it is sufficient that the donor was laboring under a delusion out of which he could not be reasoned, and which led him to make it, and which so took possession of his mind that he could not act reasonably upon the subject.[2] And a conveyance by a grantor of advanced age to his son-in-law of all his property to the exclusion of his children who were needy and worthy, in consideration of the agreement of the son-in-law to take care of him and his wife for life, will be set aside after his death, where the evidence as to his mental capacity was conflicting and the rental of the property was sufficient to pay the expenses of such keeping, the unreasonableness of the transaction being decisive.[3] So, where a gift from a principal to an agent is impeached on the ground of weakness of mind, fraud, and undue influence, it should be made to appear, in order to support it, that the confidence of the donor had not been abused, and that it was made freely and knowingly.[4] And a gift by a person of weak intellect, of her whole fortune to one who had acquired great influence over her by making her believe that he sustained a supernatural character, is invalid and will be set aside.[5] A deed or gift subject to the power of appointment by the donor from an elderly person, however, to a confidential agent without the intervention of a disinterested third person, the solicitor drawing the deed being the solicitor of the person taking the benefit under it, is valid, and will be upheld, where the circumstances did not indicate undue influence exerted over a person of insufficient understanding.[6]

§ 2. *Of a testamentary character.*

A disposition of property in anticipation of death by *ante mortem* transfers, is governed by the same tests of mental capacity as a disposition thereof by will.[7] The vital question as to

[1] See White v. Small, 2 Ch. Cas. 103.

[2] Riggs v. American Tract Society, 95 N. Y. 503.

[3] Bressy v. Gross (Ky.) 7 S. W. 150.

[4] Parris v. Cobb, 5 Rich. Eq. 450.

[5] Nottidge v. Prince, 2 Giff. 246.

[6] Hunter v. Atkins, 3 Myl. & K. 113.

[7] Young v. Otto, 57 Minn. 307; Grear v. Grear, 9 Gratt. 330. And see Dinges v. Branson, 14 W. Va. 100.

the validity of a gift made within a few days before the donor's death is not what he contemplated or intended, but whether his intentions were carried into effect, and an intelligent will directing or assenting to the act done is essential.[1] The rule of testamentary capacity, that the testator must have a fair appreciation of the nature of the act, of the property he has, and of what he wishes to do with it, applies substantially in cases of a gift during life of a not clearly undue portion of the donor's estate to a natural object of his bounty.[2] And a deed by a parent to a child as a gift will not be set aside because it constitutes an unequal distribution of his property unless incapacity is shown or some imposition practised or confidence abused or undue influence appears.[3] Nor is evidence that a father, believing that his son had wronged him, attempted to kill him, after which he inflicted a mortal wound upon himself and expressed regret that he did not accomplish his purpose, and gave a package of bonds to a favorite daughter-in-law, thus departing from a previously declared intention as to their disposition, sufficient to establish insanity which will defeat the gift.[4] And a gift by a mother to a son is not invalidated, where she was possessed of all her faculties, by the mere fact that she was advanced in years and did not have independent advice.[5] And the fact that an aged man who made a deed to one of his heirs to the exclusion of others manifested prudence and judgment in determining the best mode of having the conveyance take effect after his death gives rise to a presumption that he was not incapacitated to execute the instrument.[6] So, evidence of extreme old age and loss of memory and garrulousness will not affect a gift made to a son with whom the donor had lived for many years, where he attended to his own affairs at the time, and could write a complicated receipt, and was never irrational, and the gifts were apparently voluntary.[7] And declarations of a grantor while of sound mind as to his intentions con-

[1] Duncombe v. Richards, 46 Mich. 166.

[2] Elcessor v. Elcessor, 146 Pa. 359. And see Grear v. Grear, 9 Gratt. 330.

[3] Moore v. Moore, 67 Mo. 192.

[4] Crum v. Thornley, 47 Ill. 192.

[5] Soberanes v. Soberanes, 97 Cal. 140.

[6] Clearwater v. Kimler, 43 Ill. 272.

[7] Re Allison, 35 N. Y. S. R. 323.

cerning the disposal of certain property, made before sickness which is claimed to have resulted in unsoundness of mind, do not of themselves tend to prove that he was insane at the time of making a subsequent deed to others.[1] Gifts *causa mortis*, however, like wills, are usually made when the situation of the donor renders him particularly susceptible to undue influence, and should be closely scrutinized and set aside in every case of doubt as to capacity and volition.[2] A finding that a grantor was of sound mind up to within three days of the making of a gift, and from that time on his mind was unsound, will be set aside as against the evidence where it consisted of statements as to characteristics exhibited continuously for at least three months prior to the date of the commencement of insanity as it specified in the finding.[3]

So, where at the time of a gift the donor's mind was enfeebled by age and disease, though not to the extent of producing mental unsoundness, and he acted without independent and disinterested advice, the gift being a large portion of his estate and operating to deprive those having a natural claim on his bounty of all benefit therefrom, a jury is authorized to find the gift void from undue influence.[4] And one who takes a voluntary conveyance from an aged and infirm person, whether the relation existing between them is confidential or not, or that of consanguinity or otherwise, is bound to make it satisfactorily appear that the grantor fully understood the character, nature, and effect of his act.[5] And a deed in the nature of a testamentary disposition, purporting to have been signed by the grantor by his mark when he was in his ninetieth year, partly deaf and nearly blind and helpless, which was drawn in the handwriting of the husband of the grantee and witnessed only by her son, requires for its support something more than proof by the subscribing witnesses that he saw it executed.[6] So, a transfer of a large amount of property without consideration by an aged widow to one who claims to be a spiritual

[1] Howe v. Howe, 99 Mass. 88.

[2] Duncombe v. Richards, 46 Mich. 166; Ellis v. Secor, 31 Mich. 185, 18 Am. Rep. 178; Thorp v. Amos, 1 Sandf. Ch. 26; Shirley v. Whitehead, 1 Ired. Eq. 130.

[3] Field v. Shorb, 99 Cal. 661.

[4] Woodbury v. Woodbury, 141 Mass. 330, 55 Am. Rep. 479.

[5] Jones v. Thompson, 5 Del. Ch. 374.

[6] Lansing v. Russell, 13 Barb. 521.

medium, the widow believing that she was fulfilling the wishes of her deceased husband conveyed to her through such medium, to adopt him as her son and make the transfer, will be set aside in the absence of proof that it was the voluntary and well-considered act of her own free will.[1] And a deed made by a man eighty-two years of age, a few days after an accident resulting in the death of his wife, to one for whom he had no peculiar or excessive affection, without consideration, should be set aside as the probable result of weakness of mind and undue influence.[2]

VII. PARTNERSHIP—WHAT INSANITY WARRANTS DISSOLUTION.

The lunacy of a partner as a ground for dissolution of the partnership depends upon the degree and probable duration of the disorder as affecting his capacity to fulfil his contract.[3] A partnership will be dissolved in equity where a partner becomes so disordered in mind as to be incapable of conducting the partnership business according to the terms of the copartnership agreement.[4] Permanent, confirmed, and incurable insanity of a partner is a ground for dissolution of the partnership,[5] at the instance of the lunatic, as well as that of the other partner.[6] And where incapacity has continued for eighteen months, and the evidence shows reasonable ground for supposing recovery to be hopeless, or at least improbable, during the remainder of the term for which the partnership is to continue, an application for dissolution is proper.[7] So, a partnership, by the articles of which it was stipulated that in the event of lunacy obliging a partner to quit India for more than a year a dissolution should be had, may be dissolved where a partner becomes an incurable lunatic on his way to India, and is sent back.[8] But courts of equity will, as between partners, upon application for a dissolution on the ground of the insanity of the partner, look to the effect produced upon the partnership business, and refuse to determine it unless

[1] Lynn v. Home, L. R. 6 Eq. 655.
[2] Musick v. Fisher, 16 Ky. L. Rep. 277.
[3] Waters v. Taylor, 2 Ves. & B. 299.
[4] Sayer v. Bennett, 1 Cox, Ch. 107.
[5] Sadley v. Lee, 6 Beav. 324; Jones v. Lloyd, L. R. 18 Eq. 265.
[6] Jones v. Lloyd, L. R. 18 Eq. 265.
[7] Leaf v. Coles, 1 DeG. M. & G. 175.
[8] Bagshaw v. Parker, 10 Beav. 532.

the insanity materially affects the capacity of the partner to discharge the duties imposed by the relation.[1] And as a bill therefor proceeds upon the principle that the insane partner is incapable of receiving notice of dissolution, strict evidence of insanity, and not mere incapability, is required.[2] And mere temporary or curable disorder of the mind on the part of a partner is not sufficient to warrant a dissolution,[3] where there is a fair prospect of recovery within a reasonable time.[4] Where upon the insanity of a partner the other continues the business precisely as before without objection, it will be presumed that he did not intend a dissolution, but that he waited to determine whether the incapacity would prove permanent or temporary.[5] And the fact that the conduct and state of mind of a partner were such as to destroy the confidence of the other partners, and to induce customers to withdraw their custom from the firm, and that the malady under which he labored had led him to attempt suicide and might lead him to attempt the life of one of his partners, is not sufficient to warrant the court in enjoining him from interfering with the partnership affairs.[6] So, strong evidence would be required to establish the conclusion that a person ostensibly taking an active part in the conduct of the partnership would be held irresponsible with respect to acts of a partner on the ground of his insanity,[7] and insanity which will sustain an inquisition and the appointment of a conservator and a commitment to an insane asylum will not authorize the dissolution of a partnership,[8] such an adjudication having the effect only of establishing his insanity.[9] And no dissolution will be made on the ground of the insanity of a partner without inquiry as to the state of his mind at the time the relief is sought,[10] the affirmative of the issue resting

[1] Raymond v. Vaughn, 128 Ill. 256, 4 L. R. A. 440.

[2] Kirby v. Carr, 3 Younge & C. 135.

[3] Raymond v. Vaughn, 128 Ill. 256, 4 L. R. A. 440; Pearce v. Chamberlain, 2 Ves. Sr. 33; Leaf v. Coles, 1 DeG. M. & G. 175.

[4] Raymond v. Vaughn, 128 Ill. 256, 4 L. R. A. 440.

[5] Raymond v. Vaughn, 128 Ill. 267, 4 L. R. A. 444.

[6] Anonymous, 2 Kay & J. 441.

[7] Sadley v. Lee, 6 Beav. 324.

[8] Raymond v. Vaughn, 128 Ill. 256, 4 L. R. A. 440.

[9] Raymond v. Vaughn, 128 Ill. 256, 4 L. R. A. 440; Raymond v. Vaughn, 17 Ill. App. 144. See Milne v. Bartlett, 3 Jur. 358.

[10] Ogilvy v. Gregory, 4 Week. Rep. 221; Anonymous, 2 Kay & J. 441.

with the partner who had been previously insane.[1] And a partner will not be enjoined from interfering with the partnership business in the absence of evidence of incompetency at the time, though some months previous he had been habitually insane.[2]

VIII. Agency.

An agency not coupled with an interest is revoked by the insanity of the principal rendering him incapable of contracting.[3] When any act of Providence deprives the principal of the power to exercise judgment or will on the subject, the authority of the agent to act is thereby suspended for the time being,[4] especially where the statute requires that an insane person shall be represented by his guardian in all transactions concerning his estate.[5] Though where he recovers and manifests no will to terminate the authority it may be considered as a mere suspension, and his assent to acts done during the suspension may be inferred from his forbearance to express dissent when they came to his knowledge.[6] It has been held, however, that an inquisition of lunacy is the only evidence of insanity which can be admitted to terminate an agency.[7] But whether the fact of insanity is formally established or not the agent cannot justify or support an act under the authority originally given, done after he had knowledge of the incapacity of his principal.[8] And the fact that the principal was put under guardianship as insane does not warrant the court in holding that an agency previously created was thereby terminated where it does not appear that the insanity was such as to disqualify him from entering into a valid contract.[9]

[1] Anonymous, 2 Kay & J. 441.

[2] Ogilvy v. Gregory, 4 Week. Rep. 221.

[3] Blake v. Garwood, 42 N. J. Eq. 276; Matthiessen & W. Ref. Co. v. McMahon, 38 N. J. L. 536; Hill v. Day, 34 N. J. Eq. 154; Motley v. Head, 43 Vt. 633; Drew v. Nunn, 40 L. T. N. S. 676.

[4] Davis v. Lane, 10 N. H. 156.

[5] Renfro v. Waco (Tex.) 33 S. W. 766.

[6] Davis v. Lane, 10 N. H. 156.

[7] Wallace v. Manhattan Co. 2 Hall (N. Y.) 495.

[8] Bunce v. Gallagher, 5 Blatchf. 483.

[9] Motley v. Head, 43 Vt. 633.

IX. Public office.

Persons who are actually insane or idiotic would probably be deemed ineligible to hold public office, even in the absence of statutory provisions on the subject.[1] But they are made ineligible by statute in most of the states. Such provisions, however, do not exclude persons whose minds are merely enfeebled by age or disease.[2] Nor is a person who labors under hallucinations or delusions excluded where they do not relate to political matters and do not go to the extent of incapacitating him for the transaction of ordinary business.[3] So, the fact that an administrator was sent to an insane asylum does not create an absolute vacancy in the administratorship so that another who had renounced his right to administer in the former's favor can retract the renunciation.[4]

X. Marriage.

§ 1. *What incapacity affects.*

Marriage is a civil union depending upon contract express or implied and requiring the exercise of reason which a person of unsound mind is incapable of exercising[5]. And a marriage by an insane person is a nullity because of the inability of such person to assent;[6] and the rule is the same though the insanity is temporary.[7] And the performance of a marriage ceremony between a person deprived of reason at the time, and another, and their continued cohabitation until death, do not constitute a legal mar-

[1] See Sinks v. Reese, 19 Ohio St. 306, 2 Am. Rep. 397.

[2] Sinks v. Reese, 19 Ohio St. 306, 2 Am. Rep. 397.

[3] Clark v. Robinson, 88 Ill. 498.

[4] Re Moore's Estate, 68 Cal. 281.

[5] Jenkins v. Jenkins, 2 Dana, 103, 26 Am. Dec. 437; Cole v. Cole, 5 Sneed, 57, 70 Am. Dec. 275. And see Crump v. Morgan, 3 Ired. Eq. 91, 40 Am. Dec. 447.

[6] Jenkins v. Jenkins, 2 Dana, 103, 26 Am. Dec. 437; Powell v. Powell, 18 Kan. 371, 26 Am. Rep. 774; Rawdon v. Rawdon, 28 Ala. 565; Unity v. Belgrade, 76 Me. 419; Fornshill v. Murray, 1 Bland, Ch. 479; Smith v. Smith, 47 Miss. 211; Waymire v. Jetmore, 22 Ohio St. 271; Johnson v. Kincade, 2 Ired. Eq. 470; Cole v. Cole, 5 Sneed, 57, 70 Am. Dec. 275; Ward v. Duffaney, 23 Miss. 410; Christy v. Clarke, 45 Barb. 529; Turner v. Meyers, 1 Hagg. Consist. Rep. 414; Browning v. Reane, 2 Phillim. Eccl. Rep. 69. And see Keyes v. Keyes, 22 N. H. 553; Clement v. Mattison, 3 Rich. L. 93.

[7] Parker v. Parker, 2 Lee, Eccl. Rep. 382; Legeyt v. O'Brien, Millw. 325.

riage or give claim to dower or curtesy in his or her estate.[1] Though it has been held that a marriage may be ratified after recovery.[2] Nor will administration of the effects of a deceased woman be granted to a man who married her where the marriage was null and void on the ground of her mental imbecility.[3] A marriage contracted by one who had been found to be a lunatic, during a lucid interval, however, is binding on him where the proof of the existence of the lucid interval is clear.[4] And the fact that a woman had been of unsound mind and confined in a lunatic asylum would not justify a breach of promise of marriage where she was of sound mind at the time of the promise.[5] Under the Mississippi statute neither insanity nor idiocy of a party to a marriage at the time is a sufficient ground for its dissolution, unless the other party was ignorant of such disability at the time of the marriage.[6] And by the common law an idiot might contract marriage, and a marriage by an idiot or lunatic was considered valid.[7]

§ 2. *Tests.*

By some of the authorities the term "unsound mind," as used to express the degree of insanity which will invalidate a marriage, is synonymous with *non compos mentis*, embracing a total deprivation of reason,[8] accompanying idiocy, lunacy, or adventitious madness, either temporary or permanent, remedial or irremedial.[9] And imbecility of mind is not sufficient ground for a decree of nullity unless it amounts to idiocy or insanity.[10] On the other

[1] Jenkins v. Jenkins, 2 Dana, 103, 26 Am. Dec. 437; Wiser v. Lockwood, 42 Vt. 720; Smart v. Taylor, 9 Mod. 98; Re Turing, 1 Ves. & B. 140.

[2] Prine v. Prine, 36 Fla. 676, 34 L. R. A. 87; Cole v. Cole, 5 Sneed, 57. And see Brown v. Westbrook, 27 Ga. 102; Secor v. Secor, 1 McArth. 630; Wightman v. Wightman, 4 Johns. Ch. 343; Stuckey v. Mathes, 24 Hun, 461.

[3] Browning v. Reane, 2 Phillim. Eccl. Rep. 68. But see Parker v. Parker, 2 Lee, Eccl. Rep. 383.

[4] Re Gangwere's Estate, 14 Pa. 417, 53 Am. Dec. 554; Turner v. Meyers, 1 Hagg. Consist. Rep. 414; McAdam v. Walker, 1 Dow, P. C. 148.

[5] Baker v. Cartwright, 10 C. B. N. S. 124.

[6] Smith v. Smith, 47 Miss, 211.

[7] Park v. Barron, 20 Ga. 702.

[8] Jenkins v. Jenkins, 2 Dana, 103, 26 Am. Dec. 437; Foster v. Means, 1 Speer, Eq. 569, 42 Am. Dec. 332.

[9] Jenkins v. Jenkins, 2 Dana, 103, 26 Am. Dec. 437.

[10] Elzey v. Elzey, 1 Houst. (Del.) 308.

hand, it has been held that the question to be considered is whether the mind of the party was diseased or not at the time of the contract, and if the evidence shows that it was diseased the court will not consider the extent of the derangement.[1] So, the test of capacity to contract has been frequently applied to marriage, the rule adopted being that to justify a decree of nullity of a marriage there must have been such insanity or imbecility as would justify a jury in a civil action in finding the party incapable of making a contract,[2] the rule being that one who was so void of understanding as to be incapable of making a valid contract cannot contract marriage,[3] and that one who is competent to contract in law will be presumed to have sufficient mental capacity to contract a valid marriage.[4] The rule best supported by authority, and probably by reason, however, refers the test of capacity to the particular act in question, making the capacity to understand the marriage contract the test as to its validity,[5] under which a marriage contract can only be declared void on the ground of insanity or such want of understanding as renders the party incapable of assenting thereto.[6] And one who contracts marriage should be held bound thereby when he had an appreciation of the condition of the marriage state and understood the rights and responsibilities which attach to it, and regarded the marriage ceremony as the incident which effected the marriage, though he was of weak mind.[7] And an instruction that the same rule would apply to the contract of marriage as applies to other contracts is erroneous.[8] The question for determination is not whether or

[1] Hancock v. Peaty, L. R. 1 Prob. & Div. 335.

[2] Anonymous, 4 Pick. 32; Atkinson v. Medford, 46 Me. 510. And see Cole v. Cole, 5 Sneed, 57, 70 Am. Dec. 275.

[3] Middleborough v. Rochester, 12 Mass. 363; Bell v. Bennett, 73 Ga. 784. But see Ex parte Glen, 4 Desauss. Eq. 546.

[4] Powell v. Powell, 26 Miss. 783; Atkinson v. Medford, 46 Me. 510.

[5] St. George v. Biddeford, 76 Me. 593; True v. Raney, 21 N. H. 52; Baughman v. Baughman, 32 Kan. 538; Doe v. Roe, 1 Edm. Sel. Cas. 344; Kern v. Kern, 51 N. J. Eq. 574; Browning v. Reane, 2 Phillim. Eccl. Rep. 69; Durham v. Durham, L. R. 10 Prob. & Div. 80; Cannon v. Smalley, L. R. 10 Prob. & Div. 96; Hunter v. Edney, L. R. 10 Prob. & Div. 93.

[6] Lewis v. Lewis, 44 Minn. 124, 9 L. R. A. 505; Concord v. Rumney, 45 N. H. 423. And see Ward v. Dulaney, 23 Miss. 410.

Kern v. Kern, 51 N. J. Eq. 574.

[8] St. George v. Biddeford, 76 Me. 593.

not the party was aware that a ceremony of marriage was being performed, but whether or not he was capable of understanding the nature of the contract entered into, free from the influence of morbid delusion upon the subject.[1] And a marriage is void if at the time it was contracted and solemnized the husband had not sufficient mental capacity to understand that by the marriage contract he assumed all the duties, obligations, responsibilities, and all the rights accruing out of the relation, though he need not understand what such duties, obligations, and responsibilities and rights are.[2] And it is also void if the woman at the time had no conception of the meaning of the transaction, and expressed various doubts as to its nature, and was indifferent as to whom she lived with, and manifested such indecision and weakness as to render her an easy victim of design.[3] But marriage is not invalidated for want of understanding of either party where there was sufficient intelligence to understand at the time of the ceremony that they had agreed to cohabit solely together.[4] It has been held, however, that persons not having the regular use of their understanding sufficiently to deal with discretion with the common affairs of life, or whose weakness is so considerable as to amount to derangement, are incapable of contracting a valid marriage.[5] And one who is incapable from mental imbecility of taking care of his or her own person or property is not competent to dispose of such person or property by marriage.[6] But a husband would not be considered incompetent though he had not sufficient mental capacity to be able to provide a support for his family if he was possessed of sufficient means for that purpose.[7] The fact that a party to a marriage is subject to some vice or uncontrollable impulse or propensity, however, such as kleptomania, will not justify setting it aside as void where he was other-

[1] Hunter v. Edney, L. R. 10 Prob. & Div. 93; Kern v. Kern, 51 N. J. Eq. 574; Slais v. Slais, 9 Mo. App. 96.

[2] St. George v. Biddeford, 76 Me. 593.

[3] Rex. v. Kelly, cited in Shelford on Lunacy, 399.

[4] Harrod v. Harrod, 1 Kay & J. 4, 18 Jur. 853.

[5] Cole v. Cole, 5 Sneed, 57, 70 Am. Dec. 275; True v. Rauney, 21 N. H. 53; Foster v. Means, 1 Speer, Eq. 569, 42 Am. Dec. 332.

[6] Browning v. Reane, 2 Phillim. Eccl. Rep. 69.

[7] St. George v. Biddeford, 76 Me. 593.

wise sane and able to understand the nature and obligations of the marriage contract.[1] Nor is dullness of intellect, coupled with deafness and dumbness, alone sufficient to incapacitate one to marry.[2] Nor is mere weakness of understanding[3] or mere dejection of mien or singularity of character.[4] And mere imbecility or weakness of mind caused by disease would not be sufficient when unaccompanied by circumstances showing that it had been taken advantage of.[5] But a marriage clandestinely solemnized, accompanied by circumstances of fraud and circumvention, between a person of weak and deranged mind and the daughter of his trustee and solicitor, who had great influence over him and who treated him and considered him as of unsound mind, is null and void, where he was the mere instrument in their hands to go through with the necessary forms.[6]

§ 3. *The question how determined.*

The question of the incapacity of a party to contract marriage is usually raised and determined, as will be seen from an examination of the cases, in an action for a decree of nullity, but no decree declaring the nullity of the marriage of a lunatic is necessary.[7] Though the fitness and propriety of a judicial decision pronouncing the nullity of the marriage is apparent, and would be conducive to good order and the peace and conscience of the party seeking it.[8] But the question may be raised and decided in a collateral action in a suit for dower or distribution or the like;[9] or in a proceeding by a widow after the death of her husband to obtain a yearly support on objection that he was of unsound mind and

[1] Lewis v. Lewis, 44 Minn. 124, 9 L. R. A. 505.

[2] Harrod v. Harrod, 1 Kay & J. 4, 18 Jur. 853.

[3] Foster v. Means, 1 Speer, Eq. 569, 42 Am. Dec. 332.

[4] Anonymous, 4 Pick. 32.

[5] Baughman v. Baughman, 32 Kan. 538.

[6] Portsmouth v. Portsmouth, 1 Hagg. Eccl. Rep. 355.

[7] Powell v. Powell, 18 Kan. 371, 26 Am. Rep. 774; Jenkins v. Jenkins, 2 Dana, 103, 26 Am. Dec. 437; Johnson v. Kincade, 2 Ired. Eq. 470. And see Rawdon v. Rawdon, 28 Ala. 565; Williamson v. Williams, 3 Jones, Eq. 446; Wightman v. Wightman, 4 Johns. Ch. 343.

[8] Powell v. Powell, 18 Kan. 371, 26 Am. Rep. 774; Johnson v. Kincade, 2 Ired. Eq. 470.

[9] Jenkins v. Jenkins, 2 Dana, 103, 26 Am. Dec. 437. But see Williamson v. Williams, 3 Jones, Eq. 446.

incapable of contracting marriage;[1] or in an action for the recovery of pauper supplies.[2] The validity of a marriage cannot be impugned, however, on the ground of mental incapacity of the husband when the marriage ceremony was performed, where the couple had lived together as man and wife until the husband's death, so as to impair the claim of the widow to the sum allowed by law to widows in necessitous circumstances.[3] So, it is within the power of the legislature to prohibit the raising of the question of the validity of existing marriages in the trial of a collateral issue on the ground of the insanity or idiocy of the party.[4] And a statute to that effect applies to marriages existing at the time of the statute, and it cannot be shown, in an action to recover for the support of a pauper against a town in which a settlement is sought to be established by reason of the marriage performed before the passage, that it was invalid by reason of the insanity of the party.[5] And it has been held that under such a statute, if no proceeding is taken to set aside the marriage during the lifetime of the insane husband, the wife is entitled to dower.[6] So, an action prosecuted, tried, and decided as a divorce suit cannot be considered as one prosecuted to have a void marriage pronounced a nullity.[7] Mental incapacity at the time of marriage is a ground for divorce in Georgia.[8]

§ 4. *Proof to establish capacity or incapacity.*

The proof of insanity of a party to a marriage must be clear and unquestionable to invalidate it.[9] And the question of soundness or unsoundness of mind depends upon the general frame and habit of the mind, and cannot be determined from particular

[1] Bell v. Bennett, 73 Ga. 784. But see Sabalot v. Populus, 31 La. Ann. 854.

[2] Unity v. Belgrade, 76 Me. 419. And see Gathings v. Williams, 5 Ired. L. 487, 28 Am. Rep. 284.

[3] Sabalot v. Populus, 31 La. Ann. 854.

[4] Goshen v. Richmond, 4 Allen, 458. See also Wiser v. Lockwood, 42 Vt. 722.

[5] Goshen v. Richmond, 4 Allen, 458.

[6] Wiser v. Lockwood, 42 Vt. 722.

[7] Powell v. Powell, 18 Kan. 371, 26 Am. Rep. 774.

[8] Brown v. Westbrook, 27 Ga. 102.

[9] Cole v. Cole, 5 Sneed, 57, 70 Am. Dec. 275.

actions.[1] Thus, the opinion of the court as to mental capacity of a party alleged to be incapable of contracting marriage should be formed from the testimony of witnesses who have long been acquainted with him, and that of medical experts, in preference to any personal examination.[2] And testimony of a physician as to the insanity of such a party is entitled to but little weight where he did not know him at the time in question.[3] Nor does a marriage ceremony performed while the husband was upon his death-bed *in extremis* and helpless, surrounded by the wife and her friends, when he was apparently oblivious to his former wife and children, raise any presumption against the validity of the previous marriage.[4] And suicide immediately after marriage does not establish insanity at that time.[5]

So, the validity of a marriage attacked upon the ground of mental incapacity depends upon the mental condition of the party at the very time it took place, though evidence as to facts, circumstances, and conditions both before and after the marriage have some bearing as tending to show such condition.[6] But proof of the insanity of a wife both before and after the marriage will not invalidate the marriage where she was sane at that time.[7] And the fact that a party had a delusion which rendered his confinement in an asylum necessary does not establish his incompetency to understand the marriage contract.[8] And an instruction in an action to annul a marriage on the ground of the lunacy of a party, that the plaintiff must show unsoundness of mind at the time, continuing beyond question to the time of the party's death, without lucid intervals, if erroneous is rendered harmless by a finding of sanity at the time of the marriage.[9] So, knowledge that the ceremony was being performed,[10] or proper behavior at

[1] Foster v. Means, 1 Speer, Eq. 569, 42 Am. Dec. 332.
[2] Thayer v. Thayer, 9 R. I. 377.
[3] Slais v. Slais, 9 Mo. App. 96.
[4] Christy v. Clarke, 45 Barb. 529.
[5] McAdam v. Walker, 1 Dow, P. C. 148; Crum v. Thornley, 47 Ill. 192.
[6] Nonnemacher v. Nonnemacher, 159 Pa. 634; St. George v. Biddeford, 76 Me. 593; McAdam v. Walker, 1 Dow, P. C. 148.
[7] Ward v. Dulaney, 23 Miss. 410.
[8] Kern v. Kern, 51 N. J. Eq. 574.
[9] Banker v. Banker, 63 N. Y. 409.
[10] Hunter v. Edney, L. R. 10 Prob. & Div. 93.

the time of its performance,[1] is not sufficient to establish the existence of a lucid interval. But the fact that a man married with deliberation and intention, after procuring a license himself and declaring that he was going to be married, and went through the ceremony with propriety, and lived with his wife as such, shows capacity to marry, though he was of weak understanding and at times a lunatic and did many mad and frantic acts, so as to warrant a grant of administration of his effects to the woman he married.[2] And while evidence of a marriage solemnized in an unusual manner, by the wife going to the house of the husband and both parties dispensing with the ceremony generally used, and agreeing to become man and wife, shows perfect indifference to the customs of society, it does not overcome the presumption of sanity, though it may tend to show mental incapacity.[3] So, recognition by the parties of a marriage as legal and sufficient is strong evidence against a claim that the marriage was invalid for want of capacity of a party.[4] And a marriage voluntarily contracted by a person of full age and sufficient capacity to understand and carry it out after a guardian had been appointed for him, the parties living together as husband and wife for sixteen months and until his death without objection, is valid and binding where no proceedings were ever taken to invalidate it.[5] Nor will a marriage be set aside upon the ground of insanity or imbecility because a party thereto was a person of weak intellect who at times did not express himself coherently, and who was unable to reason from cause to effect, and had been judicially determined to be unfit to take care of himself and his property, where he had taken care of his property with the consent of his family, and preserved if not increased it, and manifested shrewdness and judgment in business, and conducted himself with propriety with reference to the marriage.[6] And the

[1] Turner v. Meyers, 1 Hagg. Consist. Rep. 414; Browning v. Reane, 2 Phillim. Eccl. Rep. 69.

[2] Parker v. Parker, 2 Lee, Eccl. Rep. 382; Anonymous, 4 Pick. 32; Kern v. Kern, 51 N. J. Eq. 574. See also Smith v. Smith, 47 Miss. 211.

[3] Powell v. Powell, 27 Miss. 783.

[4] Harrod v. Harrod, 1 Kay & J. 4, 18 Jur. 853.

[5] McCleary v. Barcalow, 6 Ohio C. C. 481.

[6] Kern v. Kern, 51 N. J. Eq. 574.

fact that he had an unreasonable fear of personal violence, and believed that he or his brother would be injured if they went out alone, and that he had a certain disease, which was not so, and that he could see inside of the bodies of others, does not show an insane delusion which will invalidate the marriage.[1] Nor will a marriage be declared void without an issue to try the fact, though the husband was found to be a lunatic from an antecedent period, where a son, the issue of the marriage, had enjoyed an estate devised to the lunatic and his children as a legitimate child.[2] And where a man who has been adjudged of unsound mind afterwards marries a woman with whom he lives for more than thirty years, the presumption of continued insanity will not prevail as against the presumption in favor of the legality of the marriage.[3] And a wife who waits twenty-two years after obtaining knowledge that her husband was insane when they were married is barred by lapse of time from obtaining relief.[4] So, inability on the part of a deaf and dumb person to understand others in general, especially strangers, and an occasional and not unfrequent inability to comprehend simple mathematical calculations, are insufficient to establish incapacity to contract marriage or to warrant the granting of an issue as to the validity of the marriage.[5] And a marriage will not be decreed invalid where the party alleged to be insane knew his father and uncle and his trustee, and the nature of the trustee's office, and displayed shrewdness and intelligence upon the subject of the legal relation which he bore him, though his mind was weak and he could not learn to count.[6] Nor is insanity which will invalidate a marriage established by proof of eccentricity and irritability and failure to keep a promise made before the marriage to discontinue complaining and scolding and bringing up old troubles, and proof of subsequent positive insanity.[7] And evidence that a woman performed her usual duties until the day of her marriage, and was at times dull and reticent,

[1] Kern v. Kern, 51 N. J. Eq. 574.
[2] Ellis v. Bowman, 17 L. T. 11.
[3] Castor v. Davis, 120 Ind. 231.
[4] Rawdon v. Rawdon, 28 Ala. 565.
[5] Harrod v. Harrod, 1 Kay & J. 4, 18 Jur. 853.
[6] Elzey v. Elzey, 1 Houst. (Del.) 309.
[7] Slais v. Slais, 9 Mo. App. 96.

and that after the ceremony she stated she was not worthy of her husband, and subsequently could not be aroused to take any interest in anything, and afterwards tried to strangle herself, and was sent to an asylum where she became violent and had delusions to the effect that she was not married and that there was melancholia in her mental condition at the time of the marriage is not sufficient to warrant a decree of nullity.[1] Evidence of a request by a wife the next morning after marriage to her husband to cut her throat, however, and of declarations that she had committed crimes and was unfit to be his wife, together with evidence of a previous intent to commit suicide, is sufficient to show that at the time of the marriage she was not able to understand and appreciate the nature of the act.[2] And one who while in her childhood seemed unable to learn to read or write or to learn a business so as to earn a living, but who was always supported by a brother, and who had to be washed and cleaned and put to bed by others, is not competent to contract marriage.[3]

XI. Divorce.

§ 1. *Insanity as a ground for.*

Insanity occurring after marriage is not a ground for divorce unless made so by statute.[4] And statutes prescribing other grounds for divorce of a general or kindred nature have been uniformly construed so as to exclude insanity after marriage.[5] Nor is a divorce warranted on the ground of the impotency of the wife because she was afflicted with a mental disease which was without her fault, where she lived happily with her husband for several years after the marriage, discharging all the duties pertaining to the marriage relation.[6] In Arkansas, Kentucky, and Washington, however, divorce on the ground of insanity is

[1] Cannon v. Smalley, L. R. 10 Prob. & Div. 96.

[2] Hunter v. Edney, L. R. 10 Prob. & Div. 93.

[3] Browning v. Reane, 2 Phillim. Eccl. Rep. 69.

[4] Lloyd v. Lloyd, 66 Ill. 87; Baker v. Baker, 82 Ind. 146; Tiffany v. Tiffany, 84 Iowa, 122; Wertz v. Wertz, 43 Iowa, 534; Powell v. Powell, 18 Kan. 371, 26 Am. Rep. 774; Pile v. Pile, 94 Ky. 308; Forman v. Forman, 53 N. Y. S. R. 639.

[5] See Lloyd v. Lloyd, 66 Ill. 87; Curry v. Curry, 1 Wilson, Super. Ct. (Ind.) 236.

[6] Pile v. Pile, 94 Ky. 308.

authorized by statute.[1] And insanity at the time of the marriage is a ground for divorce in Georgia.[2] And it has been held that insanity at the time of marriage, concealed from the other party, renders the marriage invalid on the ground of fraud.[3]

§ 2. *Insanity as affecting adultery.*

The general rule is that adultery committed while insane and not during a lucid interval is not a ground for divorce.[4] But insanity is no defense to an action for divorce upon the ground of adultery where at the time of the commission of the act the party was capable of appreciating the nature of the act and its probable consequences.[5] And it has been suggested that insanity which would acquit on a criminal prosecution would constitute a valid defense in a suit for divorce on that ground.[6] Where the evidence on the part of a petitioner for divorce for adultery discloses the respondent's insanity, the court will require to be satisfied that it admits of a different explanation before it will decree for the petitioner, though the question was not raised in the pleading.[7] And evidence of depravity of character and abandoned habits is not sufficient to establish insanity as a defense in a divorce case.[8] So, a wife who leaves her home under a delusion that her husband is trying to poison her, and who commits adultery with the idea that it might probably be the means of bringing about a divorce, is responsible therefor, her act furnishing a good ground for divorce.[9] And a divorce will be granted where the evidence shows the defendant to have been sane at the time of the act, notwithstanding the fact that she had been adjudicated a lunatic two or three years before, which

[1] See Newcomb v. Newcomb, 13 Bush, 544, 26 Am. Rep. 222; Hickman v. Hickman, 1 Wash. 257.

[2] Brown v. Westbrook, 27 Ga. 102.

[3] See Keyes v. Keyes, 22 N. H. 553; Hamaker v. Hamaker, 18 Ill. 137, 45 Am. Dec. 705; Smith v. Smith, 47 Miss. 211.

[4] Wray v. Wray, 19 Ala. 522; Broadstreet v. Broadstreet, 7 Mass. 474; Nichols v. Nichols, 31 Vt. 331, 73 Am. Dec. 352; Yarrow v. Yarrow [1892], P. 92.

[5] Yarrow v. Yarrow [1892], P. 92.

[6] See Yarrow v. Yarrow [1892], P. 92.

[7] Hall v. Hall, 3 Swab. & T. 349.

[8] Hill v. Hill, 27 N. J. Eq. 214.

[9] Yarrow v. Yarrow [1892], P. 92.

adjudication remained unreversed.[1] Though such an adjudication established the fact and cannot be contradicted, and the insanity is presumed to continue, the presumption being rebutted by the evidence of subsequent sanity.[2]

In Pennsylvania, however, it has been held that a wife's insanity would be a defense to an action for divorce, though it was such as to have effaced from her mind the first lines of conjugal duty.[3] But this rule has been criticised in the cases cited above, and some doubt was thrown upon it in a subsequent Pennsylvania case.[4]

So, nymphomania, consisting of a morbid sexual desire, is not such insanity as would excuse adultery as a ground for divorce.[5] And subsequent insanity of a permanent nature of a party to a marriage will not deprive the other of a right to have the marriage relation dissolved for an act of adultery committed while such party was sane and responsible.[6]

§ 3. *Insanity as affecting desertion.*

Desertion of or failure to support a wife by her husband, though made a ground for divorce by statute, is not so where it arises from insanity.[7] But a husband who wilfully deserts his wife while sane, and remains away for the statutory period warranting a divorce, cannot excuse himself on the ground that he became insane before the expiration of such statutory period.[8] And the failure of a husband to provide sufficient maintenance for his wife suitable to her condition while she is separated from him without her fault and confined in a lunatic asylum entitles her to a decree for alimony.[9] Nor is an abandonment of a husband established which will entitle him to a divorce by the fact

[1] Cook v. Cook, 53 Barb. 180.
[2] Cook v. Cook, 53 Barb. 182.
[3] Matchin v. Matchin, 6 Pa. 332, 47 Am. Dec. 466.
[4] Hansell v. Hansell, 3 Pa. Dist. R. 724.
[5] Hill v. Hill, 27 N. J. Eq. 214.
[6] Rathbun v. Rathbun, 40 How. Pr. 328; Straford v. Straford, 92 N. C. 297.
[7] Baker v. Baker, 82 Ind. 146.
[8] Douglass v. Douglass, 31 Iowa, 421.
[9] Wray v. Wray, 33 Ala. 187.

that the wife was confined in an asylum with his consent.[1] And a divorce will not be granted a husband against his wife for her abandonment on account of a quarrel where she had been insane but had been at least partially cured, and he was not at all times as considerate as he might have been in view of her infirmity and weakness.[2]

§ 4. *Insanity as affecting cruelty.*

Cruel and inhuman treatment does not warrant a divorce where it is the result of insanity.[3] The intent and motive of a party are a necessary ingredient to the offense of cruelty and barbarous treatment and indignities to the person endangering life or health as a ground for divorce, and such intent cannot be held to exist where legal insanity is established.[4] And the fact that a wife is insane, and intends personal violence to her husband, furnishes no answer to a claim for restitution of conjugal rights on her part, as the husband is not entitled to turn her out of doors because insane, but is rather bound to place her in proper custody and under proper care.[5] To establish insanity as a defense in an action for divorce for cruelty it must appear that the defendant was in such a mental condition as to deprive him of the use of his reason to the extent that he did not know right from wrong and was incapable of willing the one or the other.[6] The question whether the insanity of a husband will excuse acts of cruelty for which a divorce is asked, depends upon whether he was capable of understanding the nature and consequences of the acts charged at the time of their commission.[7] A divorce will not be granted against a wife on that ground because of a charge against her husband that he was attempting to poison her where the theory that her fears and the charge were the result

[1] Pile v. Pile, 94 Ky. 308.

[2] Franklin v. Franklin, 53 Kan. 143.

[3] Cohn v. Cohn, 85 Cal. 108; Tiffany v. Tiffany, 84 Iowa, 122; Wertz v. Wertz, 43 Iowa, 534; Avery v. Avery, 33 Kan. 1, 52 Am. Rep. 523; Powell v. Powell, 18 Kan. 371, 26 Am. Rep. 774; Hall v. Hall, 3 Swab. & T. 349.

[4] Hansell v. Hansell, 3 Pa. Dist. R. 724.

[5] Hayward v. Hayward, 1 Swab. & T. 81.

[6] Hansell v. Hansell, 3 Pa. Dist. R. 724.

[7] Hanbury v. Hanbury [1892] P. 222.

of a temporary aberration of the mind was as reasonable as any other.[1] And acts of violence on the part of a husband towards his wife, provoked by and consisting mainly of resistance of attempts to take morphine from him while he was in a state of delirium produced by its use, do not constitute extreme and repeated cruelty authorizing a divorce.[2] But violent acts upon the part of a husband toward his wife while laboring under a state of cerebral excitement arising from the fatigues and anxieties of business warrant a judicial separation where he was not an irresponsible agent and there was a liability of a recurrence of such excitement which would render cohabitation with him unsafe.[3] The mere existence of an insane delusion, however, with reference to the character and conduct of the wife or otherwise, is not sufficient as an excuse for cruelty as a ground of divorce.[4] So, the mental condition of a wife, if not such as to deprive her of power to desist from provoking conduct, will not remove her case from the rule that denies her a divorce on the ground of cruelty where the conduct complained of was provoked by her and not disproportionate to the provocation.[5]

§ 5. *Insanity as affecting the action.*

The rule adopted by the American cases is that the right to sue for a divorce is a personal one depending upon the free and voluntary consent and will of a party, and if such party is insane his guardian or next friend cannot institute such a suit.[6] But evidence that a woman was an inmate of an insane asylum for nearly two years, when she was discharged in an improved condition but not well, does not establish that she was so insane as to be incompetent to maintain an action for divorce commenced nearly four years after.[7] In England, however, the rule is that proceedings for divorce are civil, and that, where no provision is

[1] Sapp v. Sapp, 71 Tex. 348.

[2] Youngs v. Youngs, 130 Ill. 230, 6 L. R. A. 548.

[3] Martin v. Martin, 8 Week. Rep. 367.

[4] Smith v. Smith, 33 N. J. Eq. 458; Scoland v. Scoland, 4 Wash. 118. Duvale v. Duvale (N. J.) 34 Atl. 888.

[5] Worthy v. Worthy, 36 Ga. 45, 91 Am. Dec. 758; Bradford v. Abend, 89 Ill. 78, 31 Am. Rep. 67; Mohler v. Shank, 93 Iowa, 273, 34 L. R. A. 161; Birdzell v. Birdzell, 33 Kan. 434, 52 Am. Rep. 539.

[6] Ellis v. White, 61 Iowa, 644.

made in the statute, recourse must be had to the ordinary powers of civil courts where lunatics are litigants, and that the insanity of a husband or wife will not bar a suit by the committee of one of them, who is a lunatic, for the dissolution of the marriage.[1] And in Massachusetts and Rhode Island provision is made by statute for the prosecution of suits for divorce by the guardian of an insane party, or by a next friend appointed by the court for that purpose.[2] But the difficulty of ascertaining the real facts in a divorce case when either party is incapable of testifying or of instructing counsel because of insanity requires the court to proceed with the utmost caution, especially where the object of the suit is to obtain a complete dissolution of the marriage without the intelligent consent of the complainant.[3]

So, some of the earlier English cases refuse to permit an action for divorce to proceed against a defendant who had become insane, upon the ground that he was thereby incapacitated from making a defense.[4] But these cases were overruled and the rule was subsequently adopted that the lunacy of a wife after the commission of adultery is no ground for staying proceedings brought by her husband against her for divorce.[5] And this is the rule adopted by the American cases, irrespective of statute.[6] And defense by guardian is provided for by statute in Massachu-

[1] Baker v. Baker, L. R. 5 Prob. Div. 142, 49 L. J. Prob. N. S. 49, 42 L. T. N. S. 332, 28 Week. Rep. 630, Affirmed L. R. 6 Prob. Div. 12, 49 L. J. Prob. N. S. 83; Parnell v. Parnell, 2 Phillim. Eccl. Rep. 158, 2 Hagg. Consist. Rep. 169; Woodgate v. Taylor, 2 Swab. & T. 512, 30 L. J. Mat. N. S. 197, 5 L. T. N. S. 119.

[2] Garnett v. Garnett, 114 Mass. 379, 19 Am. Rep. 369; Cowan v. Cowan, 139 Mass. 377; Denny v. Denny, 8 Allen, 311; Thayer v. Thayer, 9 R. I. 377.

[3] Garnett v. Garnett, 114 Mass. 379, 19 Am. Rep. 369.

[4] Bawden v. Bawden, 2 Swab. & T. 417, 3 L. J. Mat. N. S. 94, 8 Jur. N. S. 157, 6 L. T. N. S. 27, 10 Week. Rep. 292; King v. King, cited in L. R. 2 Prob. & Div. 125; Mordaunt v. Mordaunt, L. R. 2 Prob. & Div. 129, 18 Week. Rep. 845.

[5] Mordaunt v. Moncrieffe, 43 L. J. Mat. N. S. 49, 30 L. T. N. S. 649, 22 Week. Rep. 12, L. R. 2 H. L. (Sc.) 374; Baker v. Baker, L. R. 5 Prob. Div. 142, 49 L. J. Prob. N. S. 49, 42 L. T. N. S. 322, 28 Week. Rep. 630.

[6] Rathbun v. Rathbun, 40 How. Pr. 328; Stratford v. Stratford, 92 N. C. 297.

setts and Rhode Island.[1] An action for divorce should not be tried, however, against one whose reason has been dethroned and who is thus rendered incapable of making answer to the charge or aiding counsel in the conduct of the defense, unless at least a reasonable time is allowed for recovery.[2] And a default will be opened and further proceedings stayed on suggestion that since the commission of the offense the defendant has become insane, unless the appointment of a guardian for him is procured.[3]

XII. Settlement or domicil.

Insanity need not amount to complete madness to render a party unable to choose a settlement or domicil. In such a case the jury is to consider whether the mind of the party was diseased to such an extent as to deprive him of volition, free will, and power of choice, so as to take away from him his control over his mind and his actions.[4] But incipient insanity does not incapacitate one from gaining a settlement.[5] A pauper is presumed to have sufficient intellect and intelligence to exercise a choice with regard to his residence until the contrary is conclusively shown,[6] and one who has sufficient mental capacity to form an intention and to have a choice as to his place of abode, and goes to live in the place of his choice without compulsion, and lives there for the period prescribed by law without assistance from any town, acquires a settlement in that place,[7] though proceedings for the appointment of a guardian were pending.[8] So, a residence in a town for the requisite period will give a woman a legal settlement though she is a person of weak intellect but capable of doing the coarser work about the kitchen, knitting and sewing, and is handy in taking care of small children, and can read, and attends church and behaves with propriety, though she is not

[1] See Garnett v. Garnett, 114 Mass. 379, 19 Am. Rep. 369; Little v. Little, 13 Gray, 264; Thayer v. Thayer, 9 R. I. 377.

[2] Stratford v. Stratford, 92 N. C. 297.

[3] Mansfield v. Mansfield, 13 Mass. 412.

[4] Townsend v. Pepperell, 99 Mass. 40.

[5] Buckland v. Charlemont, 3 Pick. 173.

[6] Topsham v. Chelsea, 60 Vt. 219.

[7] Westmore v. Sheffield, 56 Vt. 239; Fayette v. Chesterville, 77 Me. 28, 52 Am. Rep. 741.

[8] Talbot v. Chamberlain, 149 Mass. 57, 3 L. R. A. 254.

capable of taking care of herself by seeking employment and making contracts and providing herself with a place to live.[1] A child whose mental capacity is such that she is incapable of exercising any choice or intention in regard to her residence, however, is not emancipated upon attaining her majority, where she continues to reside in her father's family, and would take by derivation a settlement subsequently acquired by him.[2] And a marriage by a female pauper with a man so void of understanding as to be incapable of making a valid contract will not change the place of her settlement from that of her nativity.[3] But where the lunacy of a person is merely temporary and not permanent his maintenance is chargeable to the parish of his selection.[4]

XIII. Statute of limitations.

Sufficient mental ability to know what one is doing and the nature of the act done is not the test of insanity within the meaning of the statute of limitations.[5] The mental incapacity which will prevent the running of the statute of limitations must be such as to render the party unable to understand or ascertain his rights and that his rights have been trespassed upon and that such trespass would eventually destroy them.[6] And that which will prevent the statute from running against a settlement of a claim must be such as to render the party unable to understand that the relation of debtor and creditor existed between himself and the other party, and the amount he was to receive in satisfaction of the indebtedness, and to have a rational idea as to all the circumstances of the case and as to the propriety of such settlement.[7] And the statute will not run in case of a dispossession where the owner was so mentally diseased as not to know that he was the owner of the land in question, and that it was in the possession of another,

[1] Ludlow v. Landgrove, 42 Vt. 137.

[2] Topsham v. Chelsea, 60 Vt. 219.

[3] Middleborough v. Rochester, 12 Mass. 363.

[4] Reg. v. Manchester, 2 Jur. N. S. 1205; Hunslet v. Densberry Union, 2 Jur. N. S. 1207, note.

[5] Burnham v. Mitchell, 34 Wis. 117.

[6] Warlick v. Plonk, 103 N. C. 81; Oliver v. Berry, 53 Me. 206, 87 Am. Dec. 547. And see Clark v. Trail, 1 Met. (Ky.) 35.

[7] Burnham v. Mitchell, 34 Wis. 117.

and that his right would be lost by failure to act.[1] The word "insane" as used in the statute of limitations has been construed as equivalent to the term *non compos mentis*, or a person of unsound and deranged mind, as used in the statute of wills; and if a person is so insane as to be incapable of making a will he should be considered insane within the meaning and intent of the statute of limitations.[2] So, the statute of limitations will not commence running against a grantor's right to commence an action to set aside a deed which he was fraudulently induced to execute, until he recovers his reason and discovers what he has done.[3] And an incompetency which will exonerate him from the consequences of laches in not applying to have the deed set aside must be such as prevents him from realizing the nature and consequences of the fraud and the effect of the conveyance, and which precludes him from taking the necessary steps required of him.[4] But where one has ascertained the facts which constitute the fraud, and knows of its existence, the statute begins to run irrespective of the degree of intelligence possessed by him whether he has enough courage and independence to resist hostile influences and assert his rights or not.[5] Old age causing such imbecility as to render the party incapable of transacting any business is sufficient to prevent the statute of limitations from running against him,[6] and it will not run against a party who is beaten by another to such an extent that he becomes deranged so as to bar an action for the beating.[7] Nor will testimony of a witness that a person was scrambled and addled, but sometimes had pretty good sense, warrant a court in announcing its conclusion in the presence of the jury that such party was insane and that the statute of limitations would not run against him.[8] And to prove that fraud was concealed within the meaning of a statute providing that the cause of action therefor shall accrue at the time of its

[1] Warlick v. Plonk, 103 N. C. 81; Clark v. Trail, 1 Met. (Ky.) 35.

[2] Burnham v. Mitchell, 34 Wis. 117.

[3] Crowther v. Rowlandson, 27 Cal. 376.

[4] Wright v. Fisher, 65 Mich. 275. And see Allore v. Jewell, 94 U. S. 503, 24 L. ed. 260.

[5] Piper v. Hoard, 107 N. Y. 67. And see Warlick v. Plonk, 103 N. C. 81.

[6] Porter v. Porter, 3 Humph. 586.

[7] Sasser v. Davis, 27 Tex. 656.

[8] Asbury v. Fair, 111 N. C. 251.

discovery it is not sufficient to show that the person defrauded was such an imbecile or in such a condition of mind that it was scarcely possible that he could have discovered it though it was an open act if the condition of his mind was not that of actual lunacy.[1] Nor does being cross, cranky, freakish, and peculiar occasionally, either in private or public, constitute insanity within the meaning of a statutory provision that an action may be brought within two years after the removal of the disability.[2] And insanity which did not develop until after the expiration of six months from the time of the accident alleged to have caused it does not extend the period of limitation applicable to actions for personal injuries under a statutory provision for such extension where the person entitled to bring the action is insane at the time the cause of action accrues.[3]

So, a disability which will affect the running of the statute of limitations must be an existing one at the time the cause of action accrues.[4] And the statute begins to run where the party knew the facts at that time, though he was of weak mind and was induced by fraudulent representations and undue influence to refrain from procuring his rights.[5] And the fact that the son and heir of a person who had been disseised of his lands while *non compos mentis* was also *non compos mentis*, and remained so from the time of the disseisin until the time of his death, would not prevent the statute from running against his claim.[6] The fact that mental incapacity was caused by voluntary intoxication does not alter its effect in preventing the running of the statute of limitations.[7] Legal liabilities may be enforced against lunatics and idiots, and therefore the fact that they are not in all respects

[1] Manby v. Bewick, 3 Kay & J. 342.

[2] Calumet Electric Street R. Co. v. Mabie, 66 Ill. App. 235.

[3] Calumet Electric Street R. Co. v. Mabie, 66 Ill. App. 238.

[4] Griswold v. Butler, 3 Conn. 227; Clark v. Trail, 1 Met. (Ky.) 35; Jones v. Perkins, 5 B. Mon. 222; Allis v. Moore, 2 Allen, 306; Piper v. Hoard, 107 N. Y. 67; Asbury v. Fair, 111 N. C. 251; Adamson v. Smith, 2 Mill Const. 269, 12 Am. Dec. 665; Lincoln v. Norton, 36 Vt. 679; Oliver v. Pullam, 24 Fed. Rep. 127; Doe, Griggs, v. Shane, 4 Term Rep. 306; Cotterell v. Dutton, 4 Taunt. 826.

[5] Piper v. Hoard, 107 N. Y. 67.

[6] Griswold v. Butler, 3 Conn. 227.

[7] Bliss v. Connecticut & P. R. R. Co. 24 Vt. 424.

sui juris is no reason for extending the time allowed by statute for commencing actions against them.[1]

XIV. Judgments.

A judgment against a party is not void or voidable or impeachable collaterally where jurisdiction was obtained merely because the person against whom it was rendered was insane;[2] it is a lien on land;[3] and the property of a lunatic is not exempt from execution issued upon a judgment rendered subsequent to the establishment of his insanity.[4] But the fact that a person against whom a suit is commenced by service of process upon him is insane, and that he so continued until judgment was rendered, is good cause to reverse the judgment upon a writ of error.[5] Or a summary application may be made to the court in which the judgment was obtained.[6] Or where there is no remedy at law and the judgment has been improperly recovered for pretended claims not justly due, the committee may proceed by bill in equity for relief against it,[7] or to restrain the proceeding.[8] And unsoundness of mind amounting to incapacity to do or understand business is a good cause for setting aside a default and

[1] Sanford v. Sanford, 62 N. Y. 553.

[2] Walker v. Clay, 21 Ala. 807; Sacramento Sav. Bank v. Spencer, 53 Cal. 737; Dunn v. Dunn, 114 Cal. 210; Newell v. Smith, 23 Ga. 170; Foster v. Jones, 23 Ga. 168; Noel v. Modern Woodmen of America, 61 Ill. App. 597; Maloney v. Dewey, 127 Ill. 395; Boyer v. Berryman, 123 Ind. 451; Dickerson v. Davis, 111 Ind. 433; Woods v. Brown, 93 Ind. 164, 47 Am. Rep. 369; Allison v. Taylor, 6 Dana, 87, 32 Am. Dec. 68; King v. Robinson, 33 Me. 114, 54 Am. Dec. 614; Stigers v. Brent, 50 Md. 214, 33 Am. Rep. 317; Heard v. Sack, 81 Mo. 610; Crow v. Meyersieck, 88 Mo. 411; Lamprey v. Nudd, 29 N. H. 299; Crippen v. Culver, 13 Barb. 428; Sternberg v. Schoolcraft, 2 Barb. 153; Brittan v. Mull, 99 N. C. 483; Johnson v. Pomeroy, 31 Ohio St. 247; Wood v. Bayard, 63 Pa. 320; Denni v. Elliott, 60 Tex. 337; Wynne v. Newman, 75 Va. 816; Pollock v. Horn, 13 Wash. 626; Watt v. Bookover, 35 W. Va. 323; Withrow v. Smithson, 37 W. Va. 757, 19 L. R. A. 762; Bramhall v. United States, 6 Ct. Cl. 238.

[3] Withrow v. Smithson, 37 W. Va. 757, 19 L. R. A. 762.

[4] Pollock v. Horn, 13 Wash. 626.

[5] Lamprey v. Nudd, 29 N. H. 299; Demelt v. Leonard, 19 How. Pr. 142; Leach v. Marsh, 47 Me. 548, 74 Am. Dec. 503.

[6] Demelt v. Leonard, 19 How. Pr. 142.

[7] Demelt v. Leonard, 19 How. Pr. 142; Re Hopper, 5 Paige, 491.

[8] Sternbergh v. Schoolcraft, 2 Barb. 153; Robertson v. Lain, 19 Wend. 650; Clarke v. Dunham, 4 Denio, 262.

opening a judgment rendered thereon.[1] And a judgment against a debtor, taken when he had not sufficient capacity by reason of insanity to understand his rights and duties as a party to the action, no guardian having been appointed for him, making no allowance for payments which had been made, cannot be enforced, though equity in interposing will require justice to be done by way of payment of the amount due.[2] So, judgments confessed by an insane person, and a sale under execution thereon to the person in whose favor the confession was made, are properly set aside,[3] but will be allowed to stand where the sale was made to a person not a party to the judgment, and having no knowledge of its invalidity or of the insanity of the judgment debtor.[4] And it is a sufficient ground in equity for a perpetual injunction against a judgment for slander that at the time of speaking the defamatory words, and when the judgment was obtained, the defendant was insane or deranged on the subject to which such words related.[5]

XV. Bankruptcy.

A person who is so insane as to be wholly incapable of managing his affairs cannot, while in that condition, commit an act for which he can be forced into bankruptcy by his creditors against the objection of his guardian.[6] But a lunatic may be adjudged a bankrupt under the direction of his committee acting with the consent of the court in lunacy.[7] The jurisdiction of a court in lunacy over the property of a person found to be a lunatic cannot be ousted by a subsequent adjudication in bankruptcy without the consent of the court, and the trustee in bankruptcy can take the property only subject to the jurisdiction in lunacy.[8] And it cannot be devested by a voluntary settlement so as to enable the trustee to stand in the place of the beneficiary, as such settlement is void for all purposes.[9]

[1] McClain v. Davis, 77 Ind. 419.
[2] Litchfield's Appeal, 28 Conn. 127, 73 Am. Dec. 662.
[3] Crawford v. Thomson, 161 Ill. 161.
[4] Crawford v. Thomson, 161 Ill. 166.
[5] Horner v. Marshall, 5 Munf. 466.
[6] Re Marvin, 1 Dill. 178.
[7] Re Farnham [1895] 2 Ch. 799.
[8] Re Farnham [1895] 2 Ch. 799.
[9] Re Farnham [1895] 2 Ch. 799.

XVI. Insurance.

§ 1. *Insanity as a breach of warranty.*

Insanity is not, as a matter of law, a breach of warranty of sound health in an application for an insurance policy.[1] Thus, the failure of an insurance agent who applies for insurance upon his own life to state in the application that he had been insane will not invalidate the policy where he had apparently recovered, unless he knew that it was material, although the agent had been instructed to be cautious and not insure insane persons[2]. The question as to the extent to which mental disturbances will destroy or interfere with the functions of the body depends upon the circumstances of each case, and is a question of fact.[3] And the question as to whether there was a breach of warranty in a policy providing that the company should not be liable if the assured died from suicide committed within two years is one of fact for the jury, where the evidence showed that the assured shot himself intending that death should result and there was also evidence tending to show that he was insane at the time.[4]

And evidence in an action in which there was a breach of warranty in stating that none of the relatives of the insured had died insane, given by the widow of the father of the insured, that her husband needed quiet and treatment and went to an insane hospital, but was not confined with the patients, and that he complained of pains in his head and had been hurt there when a child, and that he always seemed to know what was going on, and proof that his brain was in a hardened state at death,—is sufficient to send to the jury the question whether the statement that the father had died of brain disease caused by a hurt was true.[5] So, evidence of the records of a probate court determining the father of the insured to be insane and ordering him to be sent to a lunatic asylum, and records of the asylum showing his admission therein, are not conclusive in an action upon a policy in the application for which he had stated that no member of his family had been

[1] Jacklin v. National Life Asso. 75 Hun, 595.

[2] Mallory v. Travelers' Ins. Co. 47 N. Y. 52, 7 Am. Rep. 410.

[3] Jacklin v. National Life Asso. 75 Hun, 595.

[4] Meacham v. New York State Mut. Ben. Asso. 120 N. Y. 237.

[5] Newton v. Mutual Benefit Life Ins. Co. 15 Hun, 595, Affirmed 76 N. Y. 426, 32 Am. Rep. 335.

insane.[1] But such evidence, together with proof that the father had received a head injury when a child, and that there were signs of weakened mental powers until death, and that he had hardening of the brain, does not authorize the court to determine the statement in an application to be a breach of warranty, as a matter of law, where it appears that the father knew what was going on until his death, and was sent to an asylum for quiet treatment.[2] A question in an application for insurance, as to whether the relatives, including parents, brothers, or sisters of the applicant, had died of or been afflicted with insanity, epilepsy, or other hereditary diseases, includes insanity of a hereditary character only, and does not apply to accidental or temporary insanity. And an answer in the negative does not constitute a breach of warranty because one of such relatives died while insane from a temporary or accidental cause.[3]

§ 2. *Homicide by insane act.*

The killing of the insured by an insane person is not within a condition in an insurance policy invalidating it if death should result from intentional injuries inflicted by the insured or any other person;[4] and the killing of the insured by the beneficiary in a policy under such circumstances that it would be murder if he were sane does not forfeit it or bar a suit for the money where he was insane.[5]

§ 3. *Insanity as affecting suicide.*

The general rule is that the death of an insured person by his own hand when *non compos mentis* is as much the result of disease as death by fever or consumption.[6] And that self-killing, suicide, or dying by one's own hand or self-inflicted injuries cannot be predicated on the act of an insane person, as in either case it is not his deliberate act,[7] the words "suicide" and "die by his

[1] Newton v. Mutual Benefit Life Ins. Co. 76 N. Y. 426, 32 Am. Rep. 335.

[2] Newton v. Mutual Benefit Life Ins. Co. 76 N. Y. 429, 32 Am. Rep. 335.

[3] Newton v. Mutual Benefit Life Ins. Co. 15 Hun, 595, Aff'd in 76 N. Y. 426, 32 Am. Rep. 335; Peasley v. Safety Deposit Life Ins. Co. 15 Hun, 227.

[4] Marceau v. Travelers' Ins. Co. 101 Cal. 338.

[5] Holdom v. Ancient Order of United Workmen, 159 Ill. 619, 31 L. R. A. 67.

[6] John Hancock Mut. L. Ins. Co. v. Moore, 34 Mich. 41.

[7] Accident Ins. Co. v. Crandal, 120 U. S. 527, 30 L. ed. 740; Knicker-

own hand" meaning the same thing.[1] And the policy is not rendered void by the death of the assured by his own hand while insane by any principle of public policy in the absence of any provisions to that effect.[2] The act of self-destruction which will avoid an insurance policy containing a condition against liability if the assured shall die by his own hand must be voluntary.[3] And it must not have been an insane act and the immediate consequence and result of insanity.[4] And suicide committed while the assured understood as a man of sound sense what consequences would follow from his act to himself, his character, his family, and others, and had ability to understand the wrongfulness of the act as a sane man would, is to be regarded as the act of a sane man which will invalidate the policy.[5] And suicide by one in possession of his ordinary reasoning faculties, from pride, anger, jealousy, shame, dread of exposure, fear of poverty, or a desire to escape from the ills of life, is within such a proviso.[6] Death from an overdose of laudanum by mistake, however, is not within a condition against suicide, though the mistake might have been caused by intoxication.[7]

So, an insurance policy containing the condition sometimes inserted in English policies, that it shall be void if the assured shall commit suicide, unless the policy is assigned to other parties for valuable consideration before death, is not invalidated as against

bocker Life Ins. Co. v. Peters, 42 Md. 414; Eastabrook v. Union Mut. L. Ins. Co. 54 Me. 224, 89 Am. Dec. 743; Blackstone v. Standard Life & Acci. Ins. Co. 74 Mich. 592, 3 L. R. A. 486; Phillips v. Louisiana Equitable L. Ins. Co. 26 La. Ann. 404, 21 Am. Rep. 549; Life Asso. of America v. Waller, 57 Ga. 533; Breasted v. Farmer's Loan & T. Co. 8 N. Y. 299, 59 Am. Dec. 482; Scheffer v. National L. Ins. Co. 25 Minn. 534; Tollmar v. Germania L. Ins. Co., cited in Bliss on Life Insurance, § 242; Horn v. Anglo-Australian & U. Family L. Ins. Co. 7 Jur. N. S. 673.

[1] Moore v. Connecticut Mut. L. Ins. Co. 1 Flipp. 363; Mutual L. Ins. Co. v. Wiswell, 56 Kan. 765, 35 L. R. A. 258.

[2] Horn v. Anglo-Australian & U. Family L. Ins. Co. 30 L. J. Ch. 511, 4 L. T. N. S. 142, 9 Week. Rep. 359.

[3] St. Louis Mutual Life Ins. Co. v. Graves, 6 Bush, 268

[4] Hathaway v. National L. Ins. Co. 48 Vt. 336.

[5] Ritter v. Mutual L. Ins. Co. 70 Fed. Rep. 958.

[6] Mutual L. Ins. Co. v. Terry, 82 U. S. 15 Wall. 580, 21 L. ed. 236; Charter Oak L. Ins. Co. v. Rodel, 95 U. S. 285, 24 L. ed. 433; Moore v. Connecticut Mut. L. Ins. Co. 1 Flipp. 363.

[7] Equitable L. Assur. Soc. v. Paterson, 41 Ga. 338, 5 Am. Rep. 535.

an assignee by the death of the insured by suicide while of unsound mind;[1] nor would it be void where the policy was pledged as collateral security;[2] and the rule is the same though the insurers are the ones to whom the policy is pledged.[3] And a letter written by the insured to a creditor charging the policy for a floating balance due him, made three years previous to his death by his own hand, is sufficient to constitute an assignment thereof.[4] But a policy assigned to trustees under a deed of settlement, the assured covenanting to pay the premiums and to perform such acts as will be necessary to keep the policy on foot, is invalidated where the insured afterwards intentionally destroyed his life, though he was not capable of judging between right and wrong.[5]

§ 4. *Test of consciousness and intent.*

The rule in England is that a condition in a life insurance policy against liability in case of death by suicide includes all cases of voluntary self-destruction whether the assured was sane or not at the time,[6] the question being whether or not the act was done voluntarily and not from confusion of the senses.[7] But to avoid a policy containing such a clause on the ground of insanity it must appear that the assured could distinguish between right and wrong to the extent of being able to understand and appreciate the nature and quality of the act he was doing.[8] And a person is not necessarily insane who voluntarily commits suicide, intending to kill himself, at a time when he is considered in general terms to be incapable of distinguishing between right and wrong, and such incapability might exist because of want of requisite knowledge, experience, or reasoning powers equal to the occasion, though quite

[1] Dufaur v. Professional L. Assur. Co. 25 Beav. 599, 4 Jur. N. S. 841, 27 L. J. Ch. 817.

[2] White v. British Empire Mut. L. Assur. Co. 19 L. T. N. S. 306, 17 Week. Rep. 26, L. R. 7 Eq. Cas. 394.

[3] White v. British Empire Mut. L. Assur. Co. 19 L. T. N. S. 306, 17 Week. Rep. 26, L. R. 7 Eq. Cas. 394.

[4] Jones v. Consolidated Invest. Assur. Co. 26 Beav. 256.

[5] Dormay v. Borradaile, 5 C. B. 380, 11 Jur. 231.

[6] Schwabe v. Clift, 2 Car. & K. 134, on Appeal, 3 Man. G. & S. 437, 17 L. J. C. P. 2; Borradaile v. Hunter, 5 Man. & G. 639.

[7] Stormont v. Waterloo L. & C. Assur. Co. 1 Fost. & F. 22.

[8] Schwabe v. Clift, 2 Car. & K. 134, on Appeal, 3 Man. G. & S. 437, 17 L. J. C. P. 2.

sufficient to sustain the character of a man of sense and understanding on an ordinary occasion.'

The same test has been adopted by many of the American states. Thus, a life insurance policy containing a condition that it shall be void if the assured shall die by his own hand is avoided by suicide committed when he understood the nature of the act and intended to take his own life though he may have been insane,[2] and though he was not capable of judging between right and wrong,[3] or of understanding or appreciating the nature and quality of his act.[4] And a policy containing such a condition is invalidated by suicide where the assured exercised volition and was capable of forming an intention, and committed the act with full knowledge that death would follow, his mind concurring in the act.[5] And an act of self-destruction will invalidate an insurance policy containing such a condition, where he had sufficient mind, reason, and judgment to rationally consider and determine whether he preferred to die or to live, though his mind was to some extent unsound;[6] and such a policy is not avoided where there is no evidence of delirium or madness or that the act was involuntary.[7]

§ 5. *Test of capacity to understand moral character of the act.*

The rule adopted by the United States Supreme Court, and followed by a number of the state courts, is that the intentional killing of himself by the assured when his reasoning faculties are so far impaired by insanity that he is unable to understand the moral character of his act is not suicide, self-destruction, or dying by his own hand, within the meaning of such words in a condi-

[1] Dormay v. Borradaile, 10 Beav. 335.

[2] Dean v. American Mut. L. Ins. Co. 4 Allen, 96; Weed v. Mutual Ben. L. Ins. Co. 70 N. Y. 561; Van Zandt v. Mutual Ben. L. Ins. Co. 55 N. Y. 169, 14 Am. Rep. 215; Mutual Ben. L. Ins. Co. v. Daviess, 87 Ky. 541; Hathaway v. National L. Ins. Co. 48 Vt. 336; Boorman v. Northwestern Mut. Relief Asso. 90 Wis. 144; Gay v. Union Mut. L. Ins. Co. 9 Blatchf. 142; Zimmerman v. Masonic Aid Asso. 75 Fed. Rep. 236.

[3] Gay v. Union Mut. L. Ins. Co. 9 Blatchf. 142.

[4] Nimick v. Mutual Ben. L. Ins. Co. 3 Brewst. 502; Mutual Ben. L. Ins. Co. v. Daviess, 87 Ky. 541; Pierce v. Travelers' L. Ins. Co. 34 Wis. 389; Gay v. Union Mut. L. Ins. Co. 9 Blatchf. 142.

[5] Weed v. Mutual Ben. L. Ins. Co. 70 N. Y. 561.

[6] Hathaway v. National L. Ins. Co. 48 Vt. 336.

[7] Cooper v. Massachusetts Mut. L. Ins. Co. 102 Mass. 227, 3 Am. Rep. 451.

tion in an insurance policy against liability in such cases, though he understood the physical nature, consequences, and effect of his act.[1] And a recovery on such a policy is not barred where the judgment of the assured was entirely overpowered and he was unable to distinguish between right and wrong, though he committed the act intending to take his life and knowing that death would result.[2] And suicide is not within such a condition where the assured was so insane as to render him incapable of forming a rational judgment with respect to the act of self-destruction;[3] or when his reason, conscience, and will were overpowered.[4] If the assured possessed sufficient mental capacity to form an intelligent intent to take his own life, and did so being conscious that the act he was about to commit would effect that object, it avoids the policy; but if his mind was so far impaired that he was incapable of forming such an intent, and was not conscious of the effect of his actions, the policy remains in full force.[5] So, in order to work a forfeiture of an insurance policy under a clause excepting suicide, the act must have been performed voluntarily and with intent upon the part of the assured to end his life, and not from any uncontrollable impulse resulting from insanity.[6] And in case of suicide where the insured is thus impelled the condition

[1] Connecticut Mut. L. Ins. Co. v. Aikens, 150 U. S. 468, 37 L. ed. 1148; Mutual L. Ins. Co. v. Terry, 82 U. S. 15 Wall. 580, 21 L. ed. 236; Manhattan L. Ins. Co. v. Broughton, 109 U. S. 121, 27 L. ed. 878; Charter Oak L. Ins. Co. v. Rodel, 95 U. S. 285, 24 L. ed. 433; Gay v. Union Mut. L. Ins. Co. 9 Blatchf. 142; Ritter v. Mutual L. Ins. Co. 70 Fed. Rep. 954; Waters v. Connecticut Mut. L. Ins. Co. 2 Fed. Rep. 892; New Home L. Asso. v. Hagler, 29 Ill. App. 437; Michigan Mutual L. Ins. Co. v. Naugle, 130 Ind. 79; Blackstone v. Standard L. & Acci. Ins. Co. 74 Mich. 592, 3 L. R. A. 486; Schultz v. Insurance Co. 40 Ohio St. 217, 48 Am. Rep. 676; Phadenhauer v. Germania L. Ins. Co. 7 Heisk. 567, 19 Am. Rep. 623; American L. Ins. Co. v. Isett, 74 Pa. 176.

[2] Connecticut Mut. L. Ins. Co. v. Groom, 86 Pa. 96, 27 Am. Rep. 689.

[3] Terry v. Life Ins. Co. 1 Dill. 403; Moore v. Connecticut Mut. L. Ins. Co. 1 Flipp. 363; Hiatt v. Mutual L. Ins. Co. 2 Dill. 572, note.

[4] Knickerbocker L. Ins. Co. v. Peters, 42 Md. 414.

[5] American L. Ins. Co. v. Isett, 74 Pa. 176.

[6] Blackstone v. Standard L. & A. Ins. Co. 74 Mich. 592, 3 L. R. A. 486; Phillips v. Louisiana Equitable L. Ins. Co. 26 La. Ann. 404, 21 Am. Rep. 549; Moore v. Connecticut Mut. L. Ins. Co. 1 Flipp. 363.

does not attach and the insurer remains liable.[1] And knowledge that death will ensue, and deliberation on the part of the assured, are not conclusive as to his responsibility or power to control his actions, as such knowledge and deliberation are consistent with the existence of an insane impulse which his reason could not resist,[2] the doctrine that suicide caused by irresistible impulses will not relieve the insurer has been adopted in the New York courts,[3] though they hold to the doctrine that the test is that of conscience and intent rather than capacity to understand the moral character of the act, the rule being that a policy is invalidated by suicide unless the assured was so mentally disordered as not to understand that the act he committed would cause his death, or unless he committed it under the influence of some insane impulse which he could not resist. And it is not sufficient that his mind was so impaired that he was not conscious of the moral obliquity of the act.[4]

A man is insane so as to prevent a forfeiture of an insurance policy conditioned against death by his own hand where he is not capable of understanding that his design is unlawful or that the act is morally wrong, or where, understanding this, he is unable to control his conduct in the light of such knowledge.[5] And a warranty in an application for insurance that the applicant will not die by his own hand is of the same effect with relation to suicide as a similar condition in the policy, and suicide is not death by his own hand within such a warranty where at the time the

[1] Charter Oak L. Ins. Co. v. Rodel, 95 U. S. 285, 24 L. ed. 433; Mutual L. Ins. Co. v. Terry, 82 U. S. 15 Wall. 580, 21 L. ed. 236; Moore v. Connecticut Mut. L. Ins. Co. 1 Flipp. 363; Gay v. Union Mut. L. Ins. Co. 9 Blatchf. 142; Waters v. Connecticut Mut. L. Ins. Co. 2 Fed. Rep. 892; New Home L. Asso. v. Hagler, 29 Ill. App. 437; Suppiger v. Covenant Mut. Ben. Asso. 20 Ill. App. 595; Phillips v. Louisiana Equitable L. Ins. Co. 26 La. Ann. 404; Blackstone v. Standard L. & A. Ins. Co. 74 Mich. 592, 3 L. R. A. 486; Hathaway v. National L. Ins. Co. 48 Vt. 336; American L. Ins. Co. v. Isett, 74 Pa. 176.

[2] Charter Oak L. Ins. Co. v. Rodel, 95 U. S. 285, 24 L. ed. 433.

[3] Meacham v. State Mut. Ben. Asso. 27 N. Y. Wk. Dig. 423; Van Zandt v. Mutual Ben. L. Ins. Co. 55 N. Y. 169, 14 Am. Rep. 215; Newton v. Mutual Ben. L. Ins. Co. 76 N. Y. 426, 32 Am. Rep. 335.

[4] Van Zandt v. Mutual Ben. L. Ins. Co. 55 N. Y. 169, 14 Am. Rep. 215.

[5] Waters v. Connecticut Mut. L. Ins. Co. 2 Fed. Rep. 892.

reason and faculty of the assured were so far impaired that he was unable to understand the moral character, general nature, consequences, and effect of the act, or was impelled thereto by an insane impulse which he had not the power to resist.[1]

§ 6. *Test of responsibility for criminal acts.*

The rule has been laid down that as suicide is a criminal act the rule of responsibility for criminal acts should be applied to its effect upon an insurance policy containing a condition against self-destruction, and that suicide which will avoid such a policy must have been committed where there was mind enough to form a criminal intent;[2] the defense of insanity to excuse suicide being placed upon the same ground, so far as the question of the moral character of the act is concerned, as a defense for murder, the test being the capability of the assured to judge between right and wrong.[3] The question is not whether the party was sane or insane, but whether the act of self-destruction was a criminal, intentional, and voluntary act, designed by him to take life, and whether the assured was competent to realize the consequences of the means employed.[4] And the policy will be held void unless it be clearly shown that the mental condition of the assured was such as to render him legally and morally irresponsible for his acts.[5] It has been held, however, that to understand the general nature, consequences, and effect of the act means more than merely to understand the act by which life was taken, covering suicide and its effect as an accomplished fact.[6]

§ 7. *Suicide under conditions against self-destruction, sane or insane.*

A life insurance company may lawfully stipulate in its policy that it shall be forfeited in the event that the insured shall take

[1] Mutual L. Ins. Co. v. Leubrie, 71 Fed. Rep. 843, 38 U. S. App. 37.

[2] Phadenhauer v. Germania L. Ins. Co. 7 Heisk. 567, 19 Am. Rep. 623; Beyley v. Alexander, East's Notes, Cas. 79, Morley's India Dig. 352.

[3] Moore v. Connecticut Mut. L. Ins. Co. 1 Flipp. 363; Breasted v. Farmer's Loan & T. Co. 8 N. Y. 299, 59 Am. Dec. 482.

[4] Fowler v. Mutual L. Ins. Co. 4 Lans. 202.

[5] Merritt v. Cotton States L. Ins. Co. 55 Ga. 103. And see Life Assn. of America v. Waller, 57 Ga. 533.

[6] Moore v. Connecticut Mut. L. Ins. Co. 1 Flipp. 363.

his life while insane.[1] And a policy limiting the payment in case of insane suicide to the legal reserve is valid when not prohibited by law, if the reserve is ascertainable.[2] And a clause in an insurance policy invalidating it if the assured shall die by his own hand, sane or insane, covers all conscious acts of the assured by which death by his own hands is accomplished, whether he was at the time sane or insane. If the act was done with the purpose of self-destruction it is immaterial whether or not he had a conception of the wrong involved in it.[3]

The question whether he was capable of appreciating the moral nature and quality of his purpose is not relevant further than it might help to illustrate the extent of his capacity to understand the physical character of his act.[4] And if the insured is insane at the time of taking his life an option that the insurer may pay the sum insured or refund the premiums with interest according to the equities of the case is valid and may be exercised by the insurer.[5] And the same rule applies where the insured is temporarily insane.[6] No recovery can be had by an insured person who kills himself under a policy conditioning against self-destruction whether sane or insane if he committed the fatal act other-

[1] Supreme Commandery K. of G. R. v. Ainsworth, 71 Ala. 436, 46 Am. Rep. 332; VanZandt v. Mutual Ben. L. Ins. Co. 55 N. Y. 169, 14 Am. Rep. 215; De Gogorza v. Knickerbocker L. Ins. Co. 65 N. Y. 232; Bigelow v. Berkshire L. Ins. Co. 93 U. S. 284, 23 L. ed. 918; Chapman v. Republic L. Ins. Co. 6 Biss. 238; Pierce v. Travelers' L. Ins. Co. 34 Wis. 389; Knickerbocker L. Ins. Co. v. Peters, 42 Md. 414, 7 Chicago Leg. News, 421; Kelly v. Mutual L. Ins. Co. 75 Fed. Rep. 637.

[2] Frey v. Germania L. Ins. Co. 56 Mich. 29; Salentine v. Mutual Ben. L. Ins. Co. 24 Fed. Rep. 159.

[3] Streeter v. Western Union Mut. L. & A. Soc. 65 Mich. 199; Tritchler v. Keystone Mut. Ben. Asso. 5 Northampton Co. Rep. 301; De Gogorza v. Knickerbocker L. Ins. Co. 65 N. Y. 232; Bigelow v. Berkshire L. Ins. Co. 93 U. S. 284, 23 L. ed. 918; Travelers Ins. Co. v. McConkey, 127 U. S. 661, 32 L. ed. 308; Chapman v. Republic L. Ins. Co. 6 Biss. 238; Pierce v. Travelers' L. Ins. Co. 34 Wis. 389; Adkins v. Columbia L. Ins. Co. 70 Mo. 27, 35 Am. Rep. 410; Knickerbocker L. Ins. Co. v. Peters, 42 Md. 414, 7 Chicago Leg. News, 421; Sabin v. Senate of Nat. Union, 90 Mich. 177.

[4] Pierce v. Travelers' L. Ins. Co. 34 Wis. 389.

[5] Salentine v. Mutual Ben. L. Ins. Co. 24 Fed. Rep. 159.

[6] Dennis v. Union Mut. L. Ins. Co. 84 Cal. 570.

wise than accidentally.[1] And a condition in a life insurance policy against liability in case of self-destruction, felonious or otherwise, is equivalent to a condition against liability whether sane or insane.[2] But the word "otherwise" in a condition in an insurance policy that it shall be void in case the assured shall die by his own hand or act, voluntarily or otherwise, cannot be deemed to have been used in the limited sense of applying to insanity only, and such condition is too vague and intangible to admit of practical application, and therefore will not be enforced. And a proviso that the policy shall be void if under any circumstances the insured shall die by his own hand is not enlarged in meaning by the use of the phrase "under any circumstances" so as to include every case of unintentional suicide, whether criminal or not, or committed by a person sane or insane, and the clause must be disregarded as too general and uncertain to serve any purpose in the construction of the statute.[4] The rule has been laid down in several recent cases, however, that suicide will prevent a recovery upon such a policy even though the insured killed himself, unintentionally, while insane.[5]

But it has been held that a clause containing a condition against liability in case of the death of the assured by his own act and intentions whether sane or insane is not invalidated by his suicide while completely insane,[6] or where his death is accidental.[7] And an accidental pistol wound in the foot of the insured causing tetanus with great bodily pain and delirium may be found to be the

[1] Riley v. Hartford L. & A. Ins. Co. 25 Fed. Rep. 315; Chapman v. Republic L. Ins. Co. 6 Biss. 238.

[2] Riley v. Hartford L. & A. Ins. Co. 25 Fed. Rep. 315; Jacobs v. National L. Ins. Co. 1 McArth. 632.

[3] Jacobs v. National L. Ins. Co. 1 McArth. 632; Penfold v. Universal L. Ins. Co. 85 N. Y. 317, 39 Am. Rep. 660.

[4] Schultz v. Insurance Co. 40 Ohio St. 217, 48 Am. Rep. 676.

[5] Sparks v. Knights Templars & Masons L. Indemnity Co. 1 Mo. App. Rep. 334; Union C. L. Ins. Co. v. Hollowell, 14 Ind. App. 611; Scarth v. Security Mut. L. Soc. 75 Iowa, 346; Bachmeyer v. Mutual Reserve Fund L. Asso. 82 Wis. 255, 87 Wis. 328; Streeter v. Western Union Mut. L. & Acci. Soc. 65 Mich. 199. And see Zimmerman v. Masonic Aid Asso. 75 Fed. Rep. 236; Kelley v. Mutual L. Ins. Co. 75 Fed. Rep. 637.

[6] Chapman v. Republic L. Ins. Co. 6 Biss. 238.

[7] Keels v. Mutual Reserve Fund L. Asso. 29 Fed. Rep. 198.

proximate cause of death within the meaning of such a policy where he cuts his throat in a period of delirium which is uncontrollable.[1] The presumption against suicide that a person who took poison took it unintentionally or by mistake, however, is a presumption of fact which is disputable, and stands for the fact in an action on a policy conditioning against liability in case of suicide whether sane or insane only until overcome by a preponderance of the evidence.[2] And a recovery upon an insurance policy so conditioning, where the insured died by poison administered to himself by mistake or unintentionally, may be had.[3]

§ 8. *Suicide as affecting accident insurance.*

Suicide committed by an insane person who was not conscious of what he was doing constitutes death effected through external, violent, and accidental means within the meaning of an accident policy insuring against injuries thus effected;[4] and is not within a condition in such a policy that the insurance shall not extend to any bodily injury happening directly or indirectly in consequence of bodily infirmities or disease.[5] And death of an insured person from being seized with an epileptic fit and falling down in a stream of water while fording it, and drowning, is death from personal injury caused by accidental, external, and visible means within the meaning of an accident policy insuring against such death.[6] So, an instruction in an action upon an insurance policy in which the insured was killed by another, that if the person who killed him was impelled in so doing by an insane impulse which the reason that was left to him did not enable him to resist or to understand the nature of his act, the injuries were unintentional within the meaning of a policy, will be construed as meaning that he was incapable of weighing the moral character of the act, and of determining whether it was right or wrong,

[1] Travelers' Ins. Co. v. Melick, 65 Fed. Rep. 178, 27 L. R. A. 629.

[2] Bachmeyer v. Mutual Reserve Fund L. Asso. 87 Wis. 328.

[3] Bachmeyer v. Mutual Reserve Fund L. Asso. 87 Wis. 328, 82 Wis. 255.

[4] Blackstone v. Standard L. & A. Ins. Co. 74 Mich. 592, 3 L. R. A. 486; Crandal v. Accident Ins. Co. 27 Fed. Rep. 40.

[5] Blackstone v. Standard L. & A. Ins. Co. 74 Mich. 592, 3 L. R. A. 486; Crandal v. Accident Ins. Co. 27 Fed. Rep. 40.

[6] Winspear v. Accident Ins. Co. L. R. 6 Q. B. Div. 42.

and therefore causing no material injury to the defendant where the court had carefully instructed as to the law of insanity.[1]

§ 9. *Insanity as affecting mutual insurance.*

Insanity is sickness or disability within the meaning of a by-law of a mutual benefit society providing for the payment of weekly benefits to members who through sickness or other disability are unable to follow their usual business.[2] And a member of a benevolent society who is removed from the jurisdiction thereof to an insane asylum becomes an absent brother although his legal status as a resident of his former place of abode remains unaffected, within the meaning of the by-laws requiring an absent member claiming benefits to send to a designated officer a true statement of his case attested in a specified manner.[3] So, one who was mentally competent when he became a member of a benefit society may be expelled for violation of its rules after he becomes insane.[4] And such a society may proceed against a person under its constitution and by-laws by preferring charges against him, and convict him for neglect to appear, and punish him by expulsion and loss of all rights in the society, where he has not been adjudged insane though he is apparently and actually of unsound mind.[5]

A judgment of expulsion of a member of a society is invalid, however, where the member was insane at the time and under guardianship, and his guardian was not made a party to the proceeding for the expulsion.[6] And a waiver by a member of a society of the rules of procedure adopted by it in an action involving the validity of a judgment of expulsion of a member cannot be ascertained if the member was insane at the time of the rendition of the judgment.[7]

So, a by-law of a mutual life insurance company making a certificate void if the member, whether sane or insane, should take

[1] Marceau v. Travelers' Ins. Co. 101 Cal. 338.

[2] McCullough v. Expressman's Mut. Ben. Asso. 133 Pa. 142, 7 L. R. A. 210; Burton v. Eyden, L. R. 8 Q. B. 295.

[3] Walsh v. Consumnes Tribe, No. 14, I. O. R. M. 108 Cal. 496.

[4] Noel v. Modern Woodmen of America, 61 Ill. App. 597.

[5] Peiffer v. Weishaupt, 13 Daly, 161.

[6] Hoeffner v. Grand Lodge G. O. of H. 41 Mo. App. 359.

[7] Hoeffner v. Grand Lodge G. O. of H. 41 Mo. App. 359.

his own life, is valid and effectual as to a prior certificate reciting that any violation of the requirements or laws now in force or hereafter to be enacted should invalidate the certificate.[1]

The Missouri statutory provision that suicide shall be no defense in an action upon an insurance policy unless the assured contemplated suicide when he applied for the policy applies to insurance upon the assessment plan as well as to insurance upon the level premium plan.[2]

§ 10. *Existence of insanity, how determined.*

The question whether death by suicide of an insured person was voluntary or involuntary or the result of insanity is not determinable, as a matter of law, by the court where there is evidence of insanity, but is one of fact for the jury.[3] Suicide is one of the facts which goes with all others to the jury for their consideration on the question of the existence of insanity.[4] So, the weight of evidence of insanity of the insured is a question for the jury, and not for the judge;[5] and the judge cannot properly take the case from the jury if there is any evidence tending to prove that the assured was insane when he did the act which caused his death.[6] And an instruction that the facts, to show suicide, must be irresistible, and that many doubts, as well as a strong presumption of law, would have to be overcome to show suicide, is erroneous as an invasion of the province of the jury.[7]

So, the finding of a jury on the question of the mental capacity of the assured at the time will not be disturbed on appeal where there is a conflict in the testimony.[8] But acts and circumstances

[1] Supreme Commandery K. of G. R. v. Ainsworth, 71 Ala. 436, 46 Am. Rep. 332.

[2] Knights Templar & Masons L. Indem. Co. v. Berry, 4 U. S. App. 353, 50 Fed. Rep. 511.

[3] Meacham v. New York State Mut. Ben. Asso. 120 N. Y. 237; Bachmeyer v. Mutual Reserve Fund L. Asso. 82 Wis. 255. And see Blackstone v. Standard L. & A. Ins. Co. 74 Mich. 592, L. R. A. 486.

[4] Weed v. Mutual Ben. L. Ins. Co. 3 Jones & S. 386.

[5] Charter Oak Ins. Co. v. Rodel, 95 U. S. 232, 24 L. ed. 433; Hathaway v. National L. Ins. Co. 48 Vt. 336.

[6] Charter Oak Ins. Co. v. Rodel, 95 U. S. 232, 24 L. ed. 433; Bachmeyer v. Mutual Reserve Fund L. Asso. 82 Wis. 255.

[7] Bachmeyer v. Mutual Reserve Fund L. Asso. 82 Wis. 255.

[8] New Home Life Asso. v. Hagler, 29 Ill. App. 437; Meacham v. New York State Mut. Ben. Asso. 120 N. Y. 237.

which are as consistent with sanity as with insanity will not authorize the submission of the question to the jury.[1] And where the insured fell injuring the base of his brain, and afterwards became insane and helpless and took his own life, the question whether the injury received by the fall was the cause of the killing is too conjectural to be submitted to the jury as a direct cause of self-destruction.[2] The admission of evidence in an action upon an insurance policy in which liability is sought to be avoided because the insured was killed by another, which killing was claimed to be accidental because of the insanity of the murderer, giving an inexorable test as to insanity not addressed to the mental condition of the murderer but to principles touching a certain branch of insanity generally, however, is harmless error, and affords no ground for complaint, as it is for the court to furnish the rule by which the murderer's mental condition is to be measured.[3]

§ 11. *Proof as to insanity.*

The mere fact that an insured person destroyed his own life is not sufficient to establish his insanity.[4] And evidence in an action upon an insurance policy conditioned to be invalid if the insured should die by his own hand, that he retired to his own room at bedtime and later a report of a pistol was heard and he was found in a reclining position on the sofa with a pistol near him and had been shot in the mouth, is not sufficient to establish the fact that he died voluntarily by his own hand.[5] So, the fact that a man set fire to his own buildings does not alone establish his insanity though it is admissible in connection with other evidence.[6] Nor is mere proof that the insured was insane at times sufficient to invalidate the policy,[7] though evidence of insanity is competent

[1] Weed v. Mutual Ben. L. Ins. Co. 70 N. Y. 561.

[2] Streeter v. Western Union Mut. L. & Acc. Soc. 65 Mich. 199.

[3] Marceau v. Travelers' Ins. Co. 101 Cal. 338.

[4] Knickerbocker L. Ins. Co. v. Peters, 42 Md. 414; Coffey v. Home L. Ins. Co. 44 How. Pr. 481; Moore v. Connecticut Mut. L. Ins. Co. 1 Flipp. 363; Merritt v. Cotton States L. Ins. Co. 55 Ga. 103.

[5] Phillips v. Louisiana Equitable L. Ins. Co. 26 La. Ann. 404, 21 Am. Rep. 549.

[6] Karow v. Continental Insurance Co. 57 Wis. 56, 46 Am. Rep. 17.

[7] Knickerbocker L. Ins. Co. v. Peters, 42 Md. 414.

and material,[1] and proper and necessary.[2] And the fact that the insured was in good health and had a family is entitled to consideration in connection with other circumstances in determining whether the act of suicide was voluntary or involuntary.[3] And the sudden disappearance of and failure to discover any trace of a man who if living would not go unnoticed, and who was in such a physical and mental condition as to excite the anxiety of his friends, tend to establish his death.[4] So, a letter by the insured to his wife immediately before committing suicide, stating that a voice which he thought to be his mother's told him to die, and saying that he was almost a corpse, and asking that the revolver which he intended to use should be preserved as a keepsake, furnishes sufficient evidence to warrant a jury in finding that he acted under an insane impulse caused by disease, depriving him of capacity to govern his conduct.[5] And declarations made two or three weeks before death, by the assured to his physician, that he felt that he must take his life, tend to show insanity and irresponsibility at the time of committing the act.[6]

So, the fact that a man fifty years of age had sought to rid himself of his wife, with whom he had lived pleasantly for many years, and marry a young girl fifteen years of age to whom he made improper proposals, and that he committed suicide upon learning that she had been sent away, is sufficient to require the question of his sanity to be submitted to the jury, as well as the question whether the act was done with intent to terminate his life.[7] And evidence of a sudden change of disposition upon the part of one who had been of a genial and pleasant nature and apparently happy, and whose family relations were pleasant, by becoming listless and nervous and sleepless and abstracted, seeming to be troubled, and failing at times to respond to salutations, and complaining of pain in the head, and behaving in an erratic manner, after which he cuts his throat, is sufficient to require the submis-

[1] Schultz v. Ins. Co. 40 Ohio St. 217, 48 Am. Rep. 676.
[2] New Home Life Asso. v. Hagler, 29 Ill. App. 437.
[3] Meacham v. New York State Mut. Ben. Asso. 120 N. Y. 237.
[4] John Hancock Mut. L. Ins. Co. v. Moore, 34 Mich. 41.
[5] Meacham v. New York State Mut. Ben. Asso. 120 N. Y. 237.
[6] Hathaway v. National L. Ins. Co. 48 Vt. 336.
[7] Bachmeyer v. Mutual Reserve Fund L. Ins. Co. 87 Wis. 328.

sion of the question of insanity to the jury.[1] And so is evidence tending to show that the assured labored under a severe and dangerous disease of the brain and spine which in the opinion of his physician must have proved fatal in a short time and would probably render him insane, and of conduct indicating that his mind was affected, together with evidence of his disappearance.[2]

A letter written by the insured upon committing suicide, however, telling his brother that he suffered from fear of becoming insane and had concluded to end his sufferings, together with proof of a disease which tended to produce a morbid mental state, and that he was a spiritualist and had appeared to be somewhat excited and absent-minded and morose, is sufficient to establish that his suicide was a deliberate act designed to take life, which would invalidate a policy containing a condition against death by his own hand.[3]

So, a mere belief in spiritualism on the part of the insured will not warrant a legal conclusion that his death was by suicide where there is nothing to show whether it was deliberate or accidental;[4] and evidence that the insured unaccountably went out of his bedroom very early in the morning and fell over the banisters the day before his death, and that later he complained of giddiness and pains in his head and was found falling out of the window, his wife being in the room at the time, supports a plea of insanity as an excuse for self-destruction, to some extent.[5]

XVII. Guardianship.

§ 1. *Inquisitions — nature.*

A proceeding to put a person under a conservator or guardian is in the nature of a commission on a writ *de lunatico inquirendo*.[6] And a person cannot be regarded as insane so as to authorize the appointment of a guardian or a conservator without the issue of

[1] Blackstone v. Standard L. & A. Ins. Co. 74 Mich. 592, 3 L. R. A. 486. But see McClure v. Mutual L. Ins. Co. 55 N. Y. 651.

[2] John Hancock Mutual L. Ins. Co. 34 Mich. 41.

[3] Fowler v. Mutual L. Ins. Co. 4 Lans. 202.

[4] Continental L. Ins. Co. v. Delpeuch, 82 Pa. 225.

[5] Stormont v. Waterloo Life & Cas. Assur. Co. 1 Fost. & F. 22.

[6] Griswold v. Butler, 3 Conn. 227.

such a writ and a finding of a jury thereon,[1] an appointment without an inquisition being absolutely void,[2] and impeachable in any court in a collateral proceeding in which a party seeks to benefit thereby.[3] Though chancery may exercise a temporary jurisdiction over the lunatic before inquisition when necessary for the protection of his estate or his maintenance.[4]

§ 2. *What incapacity warrants.*

The rule has been laid down that to authorize the appointment of a committee or guardian the mind of the alleged lunatic must be so far impaired as to reduce it to the standard of idiocy, and that it is not sufficient that he is incapable of managing his affairs or governing himself in consequence of mental imbecility and weakness.[5] But it would seem to be well settled that the issuance of a commission of lunacy is governed solely by a consideration of what is necessary for the protection of the person and property and the well-being and happiness of the alleged lunatic;[6] and that no regard is had for the possible results of a commission as to the validity of antecedent acts, or for motives actuating the proceeding;[7] and that utter and unmitigated madness is not the only kind of incapacity which will subject a person to a commission of lunacy.[8] Want of discretion from whatever cause is a sufficient reason for the appointment of a guardian where it is likely to bring the party to want and render him a public charge.[9] A person may be wholly incompetent to manage himself and his

[1] Eslava v. Lepretre, 21 Ala. 504, 56 Am. Dec. 266; Coon v. Cook, 6 Ind. 268.

[2] Moody v. Bibb, 50 Ala. 248; Eslava v. Lepretre, 21 Ala. 504, 56 Am. Dec. 266; Re Payn, 8 How. Pr. 220.

[3] Eslava v. Lepretre, 21 Ala. 504, 56 Am. Dec. 266.

[4] Vane v. Vane, L. R. 2 Ch. Div. 124; Re Harris (Del.) 28 Atl. 329; Nailor v. Nailor, 4 Dana, 339; Re Dey, 9 N. J. Eq. 181; Re Wendell, 1 Johns. Ch. 600; Re Kenton, 5 Binn. 613.

[5] Re Morgan, 7 Paige, 236; Re Shaul, 40 How. Pr. 205. And see Ex parte Barnsley, 3 Atk. 168; Re Donegal, 2 Ves. Sr. 407.

[6] Re J. B., 1 Myl. & C. 538; Re Hoblyn, 29 L. T. 305; Com., Euchenberg, v. Schneider, 59 Pa. 328.

[7] Re J. B., 1 Myl. & C. 538.

[8] Com., Euchenberg, v. Schneider, 59 Pa. 328.

[9] Angell v. Probate Court, 11 R. I. 187; McCammon v. Cunningham, 108 Ind. 545; Nailor v. Nailor, 4 Dana, 339.

affairs so as to justify the appointment of a committee or guardian, and yet be neither an idiot nor an imbecile,[1] and though he be not a technical idiot or lunatic.[2] Thus, the jurisdiction under the Indiana statute is not confined to cases of insanity, idiocy, or lunacy strictly so called, but is applicable to every case of mental unsoundness or imbecility which has reached such a degree as to render its subject incapable of conducting the ordinary affairs of life and leave him in a condition to become a victim of his own folly or the fraud of others.[3] And the term *non compos mentis*, used in the Maryland act giving power to courts to superintend and direct the affairs of such persons, embraces not only lunatics and idiots, but all persons of unsound mind.[4] Under the Michigan statute the infirmity which justifies the appointment of a guardian must be equivalent to insanity and such as to render the person incompetent to have charge of any affairs or do any business.[5] And a petition alleging that the party is feeble in body and mind so as to be unable to manage her business affairs with a proper degree of judgment and skill, her mind being so weak that she could be influenced by others in any direction even against her own interests and that of her family, and could be induced to part with her property without just compensation, is not sufficient to give the court jurisdiction.[6] But a finding that one is mentally incapable is equivalent to a finding of mental incompetency.[7] So, an inquisition under the Tennessee statute contemplates three kinds of incapacity,—idiocy, lunacy, and unsoundness of mind, short of those involving an inability to govern oneself and property.[8] And an instruction in a proceeding for the appointment of a guardian which distinguishes unsoundness of mind from idiocy on the one hand and lunacy on the other is proper under a statute designating three classes for whom guardians may be appointed.[9] The appointment of a committee to care for the per-

[1] Jackson v. Jackson, 37 Hun, 306; Ridgeway v. Darwin, 8 Ves. Jr. 65.
[2] Shaw v. Dixon, 6 Bush, 644; Re Conover, 28 N. J. Eq. 330.
[3] McCammon v. Cunningham, 108 Ind. 545.
[4] Greenwade v. Greenwade, 43 Md. 313.
[5] Re Storick, 64 Mich. 685.
[6] Re Storick, 64 Mich. 685.
[7] Re Leonard, 95 Mich. 295.
[8] Fentress v. Fentress, 7 Heisk. 428.
[9] Smith v. Hickenbottom, 57 Iowa, 733.

son of a party, however, is not warranted where he is not of unsound mind or incapable of taking care of himself.[1] And the appointment of a committee in a proceeding *de lunatico inquirendo* cannot be made unless it is clearly established that the party is either an idiot, a lunatic, or a person of unsound mind.[2] A return that his mind is so far weakened and impaired as to render him mentally incapable of governing himself is not sufficient.[3] And mere incompetency to manage his affairs upon the part of a party will not alone support a commission.[4] Nor will a return that he is so much impaired in memory as to render him incompetent to manage his affairs, and that he is consequently of unsound mind, justify an inquisition where it appears that he is not a lunatic.[5] Though a verdict of unsoundness is equivalent to one of idiocy or lunacy.[6] And a finding that a person whose sanity was in question was of unsound mind, not stating how or when it became unsound, and not finding him to be an idiot, is not sufficient to support an inquisition so as to render it admissible in evidence as prima facie proof of his idiocy.[7]

§ 3. *Age; disease; weakness.*

An aged person is not of unsound mind, so as to require a guardian simply because he has not sufficient strength of mind and ability to transact his business affairs with ordinary care and prudence if he is capable of transacting all ordinary business involved in taking care of his property and understands the nature and effect of what he does and can exercise his will concerning it with discretion, notwithstanding the influence of others,[8] though from the defects of age he requires something more of providence to be thrown around him for his protection and that of his property

[1] Re Beaumont, 1 Whart. 52.

[2] Re Shaul, 40 How. Pr. 204; Re Mason, 3 Edw. Ch. 380; Re Perrine, 41 N. J. Eq. 409.

[3] Re Mason, 3 Edw. Ch. 380.

[4] Sherwood v. Sanderson, 19 Ves. Jr. 280. But see Re Burr, 17 Barb. 13.

[5] Re Holmes, 4 Russ. 182; Re Morgan, 7 Paige, 236.

[6] Sherwood v. Sanderson, 19 Ves. Jr. 280.

[7] Christmas v. Mitchell, 3 Ired. Eq. 535.

[8] Emerick v. Emerick, 88 Iowa, 411, 13 L. R. A. 757; Darling v. Bennet, 8 Mass. 129; Re Shaul, 40 How. Pr. 204; Re Brown, 45 Mich. 326; Re Holmes, 4 Russ. 182; Ex parte Cranmer, 12 Ves. Jr. 445.

than his own mind furnishes.[1] A commission of lunacy is not confined to direct insanity, however, but applies to cases of imbecility of mind from any cause, as age,[2] disease, epilepsy, or habitual drunkenness.[3] And a person afflicted with senile dementia or imbecility may be declared a lunatic.[4] And a commission may issue against a person afflicted with epilepsy who is not competent to manage himself or his property, though there is no proof of actual insanity.[5] But the imbecility of age must amount to unsoundness of mind.[6] And in such case the proper return is that the party is of unsound mind so as to be unable to govern himself and his affairs.[7] The mind of an aged person must have been so impaired, however, that he was not only incapable of managing his property, but also incapable of governing himself.[8] And partial failure of memory and decay and feebleness of the intellectual faculties are not evidence of that unsoundness of mind which will justify a finding of lunacy; to warrant this it must be a total deprivation or suspension of the ordinary powers of the mind.[9]

So, mere weakness of intellect is not of itself sufficient to establish insanity justifying the issue of a commission of lunacy.[10] Nor is weakness of mind combined with lack of business capacity or experience.[11] And mere weakness of mind does not justify a decree of guardianship where in view of all the evidence the decree is not necessary either for the protection of the person or property.[12] But a guardian may be appointed for one who is of

[1] Re Langley, cited in Shelford, Lunacy, 90.

[2] Ridgeway v. Darwin, 8 Ves. Jr. 65; Re Cranmer, 12 Ves. Jr. 446; Re Perrine, 41 N. J. Eq. 411; Re Collins, 18 N. J. Eq. 253; Re Barker, 2 Johns. Ch. 232.

[3] Ridgeway v. Darwin, 8 Ves. Jr. 65.

[4] Re Kelly, 6 Prac. Rep. (Can.) 220.

[5] Re Monahan, 9 Ir. Eq. 253.

[6] Re Collins, 18 N. J. Eq. 253.

[7] Ex parte Cranmer, 12 Ves. Jr. 445.

[8] Re Lindsley, 44 N. J. Eq. 564.

[9] Re Van Auken, 10 N. J. Eq. 192.

[10] Com., Haskell, v. Haskell, 2 Brewst. 491; Greenwade v. Greenwade, 43 Md. 313; Re Donegal, 2 Ves. Sr. 407, Ves. Sr. Supp. 369.

[11] Re Mason, 60 Hun, 46.

[12] Francke v. His Wife, 29 La. Ann. 302; Watson's Interdiction, 31 La. Ann. 757.

such mental weakness that his judgment cannot be trusted in the management of business whether it arises from unsoundness of mind, idiocy, or lunacy.[1] And a commission may be granted against a person who has arrived at maturity where it appears that she has been of very weak intellect from birth, and there is no ground to expect that she will ever be capable of governing herself or managing her affairs;[2] and against a person of weak understanding who when in liquor or laboring under excitement is readily aroused into mental unsoundness, though at the time of the application he was free from such affliction and of sound mind.[3] And an instruction in an action for the discharge of a trustee, and to have the trust property turned over to the *cestui que trust*, in which insanity is alleged as a defense, that mere weakness of mind where there is no fraud or imposition will not relieve, is inapplicable to the case and fragmentary in its character.[4]

§ 4. *Tests.*

The question at issue in a lunacy proceeding is whether the defendant was so far deprived of his reason and understanding as to be unable to govern himself and manage his affairs.[5] And the question on an inquisition against one afflicted with a delusion which is shown to have a dangerous tendency is whether there is such imminent danger as to require his control for his own good

[1] Smith v. Hickenbottom, 57 Iowa, 733.

[2] Re Flint, Shelford on Lunacy, 91.

[3] Re J. B., 1 Myl. & C. 538.

[4] Obear v. Gray, 73 Ga. 455.

[5] Hamrick v. State, Hamrick, 134 Ind. 324; Fiscus v. Turner, 125 Ind. 46; McCammon v. Cunningham, 108 Ind. 545; Snyder v. Snyder. 142 Ill. 60; Guthrie v. Guthrie, 84 Iowa, 372; Shaw v. Dixon, 6 Bush, 644; Lackey v. Lackey, 8 B. Mon. 107; Re Lindsley, 43 N. J. Eq. 9; Re James, 35 N. J. Eq. 58; Re Hill, 31 N. J. Eq. 203; Re Collins, 18 N. J. Eq. 253; Re Conover, 28 N. J. Eq. 330; Jackson v. Jackson, 37 Hun, 306; Re Rogers, 9 Abb. N. C. 141; Re Burr, 17 Barb. 13; Re Mason, 1 Barb. 436; Re Barker, 2 Johns. Ch. 232; Com., Haskell, v. Haskell, 2 Brewst. 491; Re Cope, 19 Phila. 569, 7 Co. Ct. 406; Com. v. Meredith, 17 Phila. 90, 14 W. N.C. 188; McElroy's Case, 6 Watts & S. 451; Com. v. Reeves, 140 Pa. 258; Robertson v. Lyon, 24 S. C. 266; Henderson v. McGregor, 30 Wis. 78; Ex parte Cranmer, 12 Ves. Jr. 445; Gibson v. Jeyes, 6 Ves. Jr. 266.

or that of others.[1] A finding that the party is mentally incapable of governing himself or managing his affairs is sufficient to give the court jurisdiction to authorize the appointment of a committee of his estate.[2] And a commission may issue against a person incapable of managing his affairs though he is not totally incapable of taking care of himself.[3]

A return that the request to have a guardian appointed is right and reasonable, however, is not a finding that the party was insane and incapable of taking care of himself, that being the subject-matter of the inquiry.[4] And a proper instruction to the jury is that a finding against the inquisition is that the person sought to be put under guardianship is of sound mind and capable of managing his estate, and a finding in its favor that he is of unsound mind and incapable of managing his estate.[5]

Some of the cases have qualified the rule by requiring capacity for the carrying on of ordinary affairs with reasonable prudence,[6] and held that when unsoundness of mind is proved on a commission of lunacy the question is as to its degree, and that the court should look at the value and importance of the property to be controlled and consider the question whether or not he had ever previously had property to control, as his capacity would be greater in case he were used to managing property.[7] Within this rule one who has sufficient sense and judgment to transact the business affairs pertaining to the situation in life in which he is placed is not an incompetent for whom a guardian should be appointed.[8] And a woman who is able to take care of herself in the home provided for her, and who knows how to care for her house and table and clothing and transact the ordinary affairs of

[1] Com. v. Meredith, 14 W. N. C. 188, 17 Phila. 90; Owings' Case, 1 Bland, Ch. 290; Re Colvin's Estate, 3 Md. Ch. 278; Re Chattin, 16 N. J. Eq. 496.

[2] Re Mason, 1 Barb. 436; Re Barker, 2 Johns. Ch. 232.

[3] Com., Euchenberg, v. Schneider, 59 Pa. 328.

[4] Smith v. Burnham, 1 Aik. (Vt.) 84. See also Re Beaumont, 1 Whart. 52, 29 Am. Dec. 33.

[5] Cochran v. Amsden, 104 Ind. 282.

[6] Hamrick v. State, Hamrick, 134 Ind. 324; Fiscus v. Turner, 125 Ind. 46.

[7] Re Collins, 18 N. J. Eq. 253.

[8] Re Storick, 64 Mich. 685.

the household which she is accustomed to deal with, is not an incompetent;' though an inquisition would lie against a deaf mute sixty-five years of age who had been so since infancy and could neither read nor write nor express her understandings nor transact business, and had always been cared for by her relatives, though she could sweep, cook, and sew, and do common every-day work, and it was possible to communicate to her a desire that she should do such work.[2] On the other hand, however, it is held that the mere fact that a person cannot manage his estate judiciously is not sufficient to warrant the appointment of a guardian or committee.[3] Nor is the fact that his management is not such as a person of intellect, vigor, and skill might approve.[4] Mental health and fitness to manage the common and ordinary affairs of life, and not competency proportioned to the extent of the estate of the party, is all that is necessary to warrant the discharge of a committee of the property of an alleged lunatic.[5]

So, an inquisition should not issue unless the evidence shows more than eccentricity or partial unsoundness,[6] or than superstition, folly, or unfounded jealousy.[7] Nor will it issue against a man under the care of his wife, where it does not appear to be required for his comfort and protection and might be attended with injurious effects.[8] And the fact that a man is not able to provide a comfortable and suitable maintenance for his family will not authorize the appointment of a guardian, though he makes foolish bargains and squanders his earnings.[9] And the mere fact that a party is a lunatic will not warrant a commission where he enjoys lucid intervals and during such intervals he is competent to govern himself and his affairs.[10] An inquisition will lie against one not capable of governing himself or his estate,

[1] Re Storick, 64 Mich. 685.

[2] Re Perrine, 41 N. J. Eq. 409.

[3] Com. v. Reeves, 140 Pa. 258; Com. v. Meredith, 14 W. N. C. 188, 17 Phila. 90; Darling v. Bennet, 8 Mass. 129.

[4] Com., Euchenberg, v. Schneider, 59 Pa. 328.

[5] Re Mason, 60 Hun, 46.

[6] Re Cope, 19 Phila. 569, 7 Co. Ct. 406.

[7] Com., Rubright, v. Western Pa. Hospital, 3 Pittsb. 299.

[8] Re Clement, Shelford, Lunacy, 92.

[9] Partello v. Holton, 79 Mich. 372.

[10] Ex parte Atkinson, Jac. Ch. 333.

however, notwithstanding the fact that he has lucid intervals;[1] and whether the incapacity arises from unsoundness of mind, idiocy, or lunacy.[2] And a guardian may be appointed where there is reasonable ground to apprehend that the lunatic will do violence to himself or others or squander his property, though no act of madness has been committed.[3]

So, incapacity to manage the ordinary business and affairs of life will uphold the creation and continuance of a trust under Ga. Code, § 2306, providing therefor where the person is *non compos mentis*.[4] And the fact that a female defendant in an action was unmarried and above sixty years of age, and had been deaf and dumb from her infancy, constitutes such imbecility of mind as to render her incapable of defending the action, and authorizes the appointment of a guardian to defend for her.[5]

§ 5. *The question, by whom determined.*

The existence of such a state of unsoundness of mind as will give the courts jurisdiction to superintend and direct the affairs of a person is a question of fact depending upon the proof.[6] And the question whether a delusion upon a particular subject is sufficient to authorize a finding of lunacy upon an inquisition is one for the determination of a jury.[7] It would appear to be proper, however, to provide for the submission of the question either to the court or to the jury, though provisions for its submission to the jury are probably more frequent. The appointment of a guardian for an insane person by virtue of an adjudication of lunacy does not contravene constitutional or statutory provisions that in all cases involving life or liberty the accused shall have a speedy trial before an impartial jury, such provisions applying only to accusations of offenses against criminal law.[8] And although an issue has been directed to ascertain the sanity or insanity of a

[1] Re Hill, 31 N. J. Eq. 203; Guthrie v. Guthrie, 84 Iowa, 372.

[2] Smith v. Hickenbottom, 57 Iowa, 733.

[3] Com. v. Meredith, 19 Phila. 90, 14 W. N. C. 188. And see Re Cope, 19 Phila. 569, 7 Co. Ct. 406.

[4] Gray v. Obear, 59 Ga. 675.

[5] Markle v. Markle, 4 Johns. Ch. 168.

[6] Greenwade v. Greenwade, 43 Md. 313.

[7] Re M'Elroy, 6 Watts & S. 451.

[8] Black Hawk County v. Springer, 58 Iowa, 417.

person, and a verdict of insanity is returned, and the judge certifies that he cannot say that it was improper, yet an appellate court should disregard the proceeding if the evidence at the hearing was such that the chancellor should have made a different decision in the first instance.[1]

§ 6. *Proof necessary to establish.*

An order ought not to be made assigning a guardian *ad litem* for a party alleged to be of unsound mind where there is a sufficient and bona fide dispute as to such unsoundness.[2] And where the question of the well-being and happiness of the alleged lunatic and the condition and security of his property is left at all in doubt upon an inquisition the court will direct a further inquiry into the circumstances with a view to sparing the alleged lunatic vexation and expense, before ordering a commission to issue.[3]

Mere eccentricity or peculiarity is not evidence of insanity in a proceeding for the issue of a commission where that is the normal characteristic of the party.[4] Nor is evidence that the sense and physical powers of the person against whom a commission is issued are much impaired, and that his mental powers are somewhat weakened, sufficient to show unsoundness rendering him incompetent to manage his affairs.[5] Nor is the fact that he makes an improvident bargain or many such bargains, or that he is unthrifty or unsuccessful in business, though in connection with other facts it may tend to show unsoundness.[6] Nor is proof that a man is old and under the influence of his children and was induced to expend his property for their indulgence when he had usually been careful of it, sufficient.[7] And the fact that a person is in her hundredth year, and that her sight and hearing are impaired, raises no presumption against her soundness of mind.[8] So, the

[1] Atwood v. Smith, 11 Ala. 894.

[2] Fry v. Fry, L. R. 15 Prob. Div. 25, Affirmed, L. R. 15 Prob. Div. 50.

[3] Re Hoblyn, 29 L. T. 305. And see Re Peresse, 1 Molloy, 219; Re Shaul, 40 How. Pr. 204; Re Russell, 1 Barb. Ch. 38; Re Cope, 7 Pa. Co. Ct. 406, 19 Phila. 569.

[4] Com., Haskell, v. Haskell, 2 Brewst. 491; Re Cope, 19 Phila. 569.

[5] Re Collins, 18 N. J. Eq. 253.

[6] Re Carmichael, 36 Ala. 514.

[7] Darling v. Bennet, 8 Mass. 129.

[8] Re Collins, 18 N. J. Eq. 253; Re Vanauken, 10 N. J. Eq. 186. And see English v. Porter, 109 Ill. 285.

oath of a party applying for the appointment of a guardian *ad litem* for a person alleged to be of unsound mind, but not so found by inquisition, is not sufficient evidence of the lunacy; facts should be shown from which the court may judge for itself.[1] And other evidence should be taken in determining whether a guardian shall be appointed for a person alleged to be *non compos mentis* than that arising from an examination of the person himself.[2] And but little weight can be given to opinions of non-expert witnesses as to the mental condition of the defendant in an action for his interdiction.[3] The jury should be left at liberty to apply the same general rules to such testimony as are applicable to the testimony of other witnesses when estimating its value.[4] And a person will not be interdicted on the ground of idiocy and imbecility on the evidence of two medical witnesses, neither of whom had ever conversed with him until the day before the filing of their report, and who had not had an opportunity to test his mental condition.[5] But while the courts will not be controlled by the opinions of medical experts they will give them respectful consideration, giving legitimate weight to every act bearing on the issue but forming their own conclusions.[6] So, a delusion which is slight and harmless will not authorize a finding of lunacy on an inquisition where there is no prospect or probability of its working harm either to the party or his friends in person or estate.[7] But where the relator in an inquisition charges delusion, the alleged lunatic has the right to show that the accusations are founded on fact.[8] And evidence of insane delusions, together with the opinions of several competent and expert medical witnesses having excellent opportunities for judging, that the party was so insane as to be unfit to manage his affairs, is sufficient to justify setting aside a return to a commission that he was not incapacitated for the management of his estate.[9] So, insanity in

[1] McIntyre v. Kingsley, 1 Ch. Chambers, 281.
[2] Brigham v. Brigham, 12 Mass. 504.
[3] Eloi v. Eloi, 36 La. Ann. 563.
[4] Cuneo v. Bessoni, 63 Ind. 524.
[5] Watson's Interdiction, 31 La. Ann. 757.
[6] Francke v. His Wife, 29 La. Ann. 302.
[7] Re M'Elroy, 6 Watts & S. 451.
[8] Com., Haskell, v. Haskell, 2 Brewst. 491.
[9] Re Fitzgerald, 30 N. J. Eq. 59.

the family of a person against whom an inquisition is issued is entitled to consideration.[1] And evidence of previous insanity may be considered as tending to prove permanent unsoundness of mind which might have continued up to the time of the trial.[2] So, evidence in a proceeding for the appointment of a guardian that the alleged incompetent was much cast down and thought his sons had misused him and were wasting his property, and that he desired somebody to take care of it, may be considered as tending to show his mental condition, and that he was subject to delusions.[3] And evidence of impaired health by excessive drinking, and that the party underwent a sudden change of character and feeling with reference both to domestic and business matters, and wrote incoherent letters, and behaved in an unusual manner, and refused to take medicine, intimating that his family were trying to poison him, will sustain a finding that he was insane and mentally incompetent to care for himself and his estate.[4] So, evidence of forgetfulness on the part of a person against whom an inquisition is issued, of the fact that he had a considerable sum of money which he had himself deposited in a savings bank, and the recent execution by him of important papers, and of inability on his part to comprehend the nature of the proceeding in lunacy against him, warrants setting aside a return that he was capable of governing himself and his property, as against evidence.[5] The alleged lunatic may be brought into court after the return of the inquisition and an inquiry made by inspection.[6] And evidence as to the motive of the person prosecuting the commission is important to be considered.[7]

§ 7. *Inquisition as evidence — as to subsequent acts.*

The English rule is that an inquisition is presumptive evidence of lunacy only.[8] But a commission finding a testator to have been

[1] Com., Haskell, v. Haskell, 2 Brewst. 491.
[2] Obear v. Gray, 73 Ga. 455.
[3] Smith v. Hickenbottom, 57 Iowa, 733.
[4] Barbo v. Rider, 67 Wis. 598.
[5] Re Lawrence, 28 N. J. Eq. 331.
[6] Re Wendell, 1 Johns. Ch. 600; Re Payn, 8 How. Pr. 224.
[7] Francke v. His Wife, 29 La. Ann. 302.
[8] Sergeson v. Sealey, 2 Atk. 412; Faulder v. Silk, 3 Campb. 126; Rodd v. Lewis, 2 Lee, Eccl. Rep. 176; Hall v. Warren, 9 Ves. Jr. 603; Baxter v. Portsmouth, 5 Barn. & C. 170; Yates v. Boen, 2 Strange, 1104. See also

of unsound mind, remaining unsuperseded, raises a presumption in a proceeding to contest his will that he remained a lunatic until his death, though it may be rebutted by positive proof of entire recovery or a lucid interval when the will was made.[1] So, a number of the American courts have adopted the same rule, holding that the judgment of a court of competent jurisdiction on an inquisition of lunacy finding a party to be insane is prima facie evidence of the fact adjudged,[2] but that the finding of an inquest in lunacy proceeding is only presumptive proof of insanity, making a prima facie case only.[3] It is not conclusive evidence of incapacity[4] though the guardianship continues to exist[5] and is not necessarily a bar to habeas corpus,[6] but its effect is to shift the burden of proof to the party asserting capacity.[7] And it is also

Portsmouth v. Portsmouth, 1 Hagg. Eccl. Rep. 355; Johnson v. Kincade, 2 Ired. Eq. 470.

[1] Prinsep v. Dyce Sombre, 10 Moore, P. C. 232; Cartwright v. Cartwright, 1 Phillim. Eccl. Rep. 90.

[2] Wall v. Hill, 1 B. Mon. 290, 36 Am. Dec. 578; Clark v. Trail, 1 Met. (Ky.) 35; Titlow v. Titlow, 54 Pa. 216, 93 Am. Dec. 691; Rogers v. Walker, 6 Pa. 371, 47 Am. Dec. 470; Willis v. Willis, 12 Pa. 159; Noel v. Karper, 53 Pa. 97; Hamilton v. Hamilton, 10 R. I. 538; Keys v. Norris, 6 Rich. Eq. 388; Thomasson v. Kircheval, 10 Humph. 322; Stevens v. Stevens, 127 Ind. 560; Hughes v. Hughes, 2 Munf. 209.

[3] Armstrong v. Short, 1 Hawks, 11; Messenger v. Bliss, 35 Ohio St. 587; Lancaster County Nat. Bank v. Moore, 78 Pa. 407, 21 Am. Rep. 24; McGinnis v. Com., McGinnis, 74 Pa. 245; Miskey's Appeal, 107 Pa. 611; Leckey v. Cunningham, 56 Pa. 373; Koons v. Benscoter, 2 Kulp, 451; Gresh v. Tamany, 2 Kulp, 453; Com. v. Spink, 27 W. N. C. 37; Hill v. Day, 34 N. J. Eq. 150; Kern v. Kern, 51 N. J. Eq. 574. And see Johnson v. Kincade, 2 Ired. Eq. 470.

[4] Pittard v. Foster, 12 Ill. App. 132; Yauger v. Skinner, 14 N. J. Eq. 389; Hunt v. Hunt, 13 N. J. Eq. 161; Den, Aber v. Clark, 10 N. J. L. 258, 18 Am. Dec. 417; Whitnack v. Stryker, 2 N. J. Eq. 8; Hart v. Deamer, 6 Wend. 497; Johnson v. Kincade, 2 Ired. Eq. 470; Parker v. Davis, 8 Jones, L. 460; Willis v. Willis, 12 Pa. 159; Com. v. Spink, 27 W. N. C. 37; Dyre's Estate, 12 Phila. 156; Keyes v. Norris, 6 Rich. Eq. 388; Stannard v. Burns, 63 Vt. 244; Robinson v. Robinson, 39 Vt. 267. And see Kellogg v. Cochran, 87 Cal. 192, 12 L. R. A. 104.

[5] Robinson v. Robinson, 39 Vt. 267.

[6] Com. Draper, v. Kirkbride, 3 Brewst. 393; Noel v. Karper, 53 Pa. 97; Titlow v. Titlow, 54 Pa. 216, 93 Am. Dec. 691.

[7] Leckey v. Cunningham, 56 Pa. 373; Willis v. Willis, 12 Pa. 159; Glass v. Hillary, 1 Pa. Dist. R. 621.

evidence of lunacy.[1] The other party to the action, however, may traverse the truth of the inquisition and give evidence to verify his replication,[2] showing that at the time of the act he had sufficient capacity to perform it.[3] He is not estopped though he be the party who promoted the lunacy proceedings and signed the petition, and was subsequently appointed the committee of the lunatic.[4] And it is error to require the jury in an action by an heir for lands conveyed by his ancestor who had been found insane to find for the plaintiff unless they believe from the evidence that the ancestor was capable of transacting his own business with judgment and discretion.[5] And an inquisition finding a party to a marriage to be an idiot or a lunatic is open to rebuttal by the other party in an action for the annulment of the marriage.[6] Nor is the force of an adjudication of insanity affected by the marriage and consequent change of name of an insane woman.[7] Under statutes, however, invalidating contracts, gifts, etc., of persons of unsound mind, and placing the management of the affairs of such persons in the hands of the court, an inquisition has been regarded as a proceeding *in rem*, and as conclusive evidence of insanity as to all acts done after the inquisition.[8] And evidence of a lucid interval, or of recovery, is inadmissible to controvert the insanity of a person placed under guardianship, and *non est factum* may be pleaded.[9] And the appointment of a guardian by a court of

[1] Rogers v. Walker, 6 Pa. 371, 47 Am. Dec. 470; Pittard v. Foster, 12 Ill. App. 132.

[2] Armstrong v. Short, 1 Hawks, 11; Willis v. Willis, 12 Pa. 159.

[3] Parker v. Davis, 8 Jones, L. 460; Den. Aber, v. Clark, 10 N. J. L. 258, 18 Am. Dec. 417.

[4] Titlow v. Titlow, 54 Pa. 216, 93 Am. Dec. 691.

[5] Wall v. Hill, 1 B. Mon. 290.

[6] Johnson v. Kincade, 2 Ired. Eq. 470.

[7] Redden v. Baker, 86 Ind. 191.

[8] Redden v. Baker, 86 Ind. 191; Musselman v. Cravens, 47 Ind. 1; Leonard v. Leonard, 14 Pick. 280; Willwerth v. Leonard, 156 Mass. 277; Thorpe v. Hanscom, 64 Minn. 201; Kiehne v. Wessell, 53 Mo. App. 667; Southern Tier Masonic Relief Asso. v. Laudenbach, 5 N. Y. Supp. 901; Re Patterson, 4 How. Pr. 35; Hughes v. Jones, 116 N. Y. 67, 5 L. R. A. 632; Wadsworth v. Sharpsteen, 8 N. Y. 388; Wadsworth v. Sherman, 14 Barb. 171; L' Amoreaux v. Crosby, 2 Paige, 422. And see Klohs v. Klohs, 61 Pa. 245; Tozer v. Saturlee, 3 Grant, Cas. 162; White v. Palmer, 4 Mass. 147.

[9] Rannells v. Gerner, 80 Mo. 475; Kiehne v. Wessell, 53 Mo. App. 667.

competent jurisdiction cannot be attacked on the ground of irregularity in a criminal prosecution, in which the authority of the appointee to make a demand for the return of property is called in question.[1] So, the rule has been laid down that such presumption remains conclusive as long as the adjudication of incapacity remains in force,[2] though there be no acting guardian.[3] But, on the other hand, it has been held that the act of the alleged incompetent person will be valid where he is actually of sound mind, though he was under guardianship at the time.[4] And that it is no longer conclusive where the guardianship has been terminated,[5] or suspended on appeal,[6] or where the guardianship has been practically abandoned and the alleged incompetent left in charge of his own affairs.[7] And a party claiming against an inquisition may show by lapse of time or otherwise that the patient has recovered and become again able to contract, which, though it should be done on motion to discharge the guardian, may be allowed in a collateral action.[8] And a sale of real property by a person who had been adjudged insane seven years before, but for whom no guardian had been appointed, and who had in the interval recovered her reason, is voidable only and not void, although there had been no adjudication of recovery.[9]

The doctrine that an inquisition is conclusive, however, has been held to be applicable to contracts and gifts only, and the rule adopted that with reference to wills it is only prima facie evidence of incompetency.[10] Thus, a judgment declaring a testator to be in-

[1] State v. Thompson, 28 Or. 296.

[2] Hughes v. Jones, 116 N. Y. 67, 5 L. R. A. 632; Wadsworth v. Sharpsteen, 8 N. Y. 388; L'Amoreaux v. Crosby, 2 Paige, 422; Re Patterson, 4 How. Pr. 34.

[3] Redden v. Baker, 86 Ind. 191.

[4] Breed v. Pratt, 18 Pick. 115; Stone v. Damon, 12 Mass. 487.

[5] Willwerth v. Leonard, 166 Mass. 277.

[6] Grimes v. Shaw, 2 Tex. Civ. App. 20.

[7] Thorpe v. Hanscom, 64 Minn. 201.

[8] Southern Tier Masonic Relief Asso. v. Laudenbach, 5 N. Y. Supp. 901; Clark v. Trail, 1 Met. (Ky.) 35. And see Lucas v. Parsons, 23 Ga. 267; Mutual L. Ins. Co. v. Wiswell, 56 Kan. 765, 35 L. R. A. 258.

[9] Topeka Water Supply Co. v. Root, 56 Kan. 187.

[10] Lewis v. Jones, 50 Barb. 645; Southern Tier Masonic Relief Asso. v. Laudenbach, 5 N. Y. Supp. 901; Stone v. Damon, 12 Mass. 487; Breed v. Pratt, 18 Pick. 115; Harrison v. Bishop, 131 Ind. 161.

sane is not conclusive of his incapacity to make a will at a subsequent time;[1] and a court of equity may commit the property of a person not capable of managing his estate to the charge of a committee and still give effect to a will subsequently made by him while laboring under such incapacity.[2] But an inquisition finding a person insane, though not of itself establishing incompetency to make a will, when taken in connection with proof that he died insane is sufficient to cast the burden of proof of testamentary capacity upon the proponent of the will.[3] Nor do an adjudication that a person is insane, and the appointment of a guardian for him, necessarily show that his insanity is of that character which disqualifies him from making a valid contract so as to terminate an agency which he had previously conferred upon his wife, in the absence of proof as to such character.[4]

So, the appointment by the court in a pending action of a guardian *ad litem* for a party on the ground of insanity is prima facie evidence of his insanity in any subsequent stage of the case.[5] And the determination of the surrogate or a higher court having power to review his decision, with relation to the competency of the testator to make a will of personal property, is not conclusive upon the parties in a subsequent suit as to the validity of a devise of real estate in the same will.[6] And where a testator was determined to be *compos mentis* in the ecclesiastical court, and that sentence was confirmed, and afterwards on trial at law in relation to the same matter he was found to be *non compos mentis*, an application for a reversal of the sentence will be dismissed, as it is decisive and no appeal lies from it.[7]

So, the fact that a writ *de lunatico inquirendo* was not taken out by relatives of the testator is a circumstance bearing upon the question of the soundness of his mind when he made his will.[8]

[1] Pittard v. Foster, 12 Ill. App. 132; Jenckes v. Smithfield Probate Ct. 2 R. I. 255; Re Slinger's Will, 72 Wis. 22.

[2] Stewart v. Lispenard, 26 Wend. 255; Brady v. McBride, 39 N. J. Eq. 495.

[3] Re Taylor's Will, 1 Edm. Sel. Cas. 375.

[4] Motley v. Head, 43 Vt. 633.

[5] Little v. Little, 13 Gray, 264.

[6] Bogardus v. Clark, 4 Paige, 623.

[7] Maxwell v. Lord Montague, cited in 3 Atk. 546.

[8] Irwin v. West, 81 Pa. 157.

But an inquisition finding a party not to be of unsound mind is not conclusive evidence of his sanity.[1] And a verdict determining the sanity of a party on a particular day is not prima facie evidence that he was sane at a prior or subsequent date so as to invalidate a contract then made.[2] An incompetent person need not have been found insane upon inquisition to warrant the annulment of his acts.[3] A commission of idiocy finding a party to be of sound mind, and a fine and recovery suffered by him, and a warrant of attorney made, however, are conclusive evidence of sufficient sanity to make the warrant of attorney and suffer the recovery, where the issue upon his sanity is joined after his death and the warrant of attorney and caption of the fine are acknowledged before the chief justice at the same time.[4] But a finding of a jury that a person whose sanity is in question was of unsound mind, not stating how or when it became unsound, and not finding him to be an idiot, is not sufficient to support an inquisition and render it admissible as prima facie evidence of his idiocy.[5] And an inquisition had by order of the orphan's court as to the competency of a person whose sanity was questioned who had no notice does not affect his rights or those of anyone claiming under him.[6] But the appointment of a conservator, made on application of four selectmen who authorized one of their number to inquire into the case and make the application, signing their names, is not subject to collateral attack under a statute providing for such an application to be signed by the persons preferring it.[7]

§ 8. *Effect of inquisition on over-reached acts.*

The rule is universal that an inquisition of lunacy is prima facie or presumptive evidence only of the invalidity of acts done by the lunatic before the issuing of the commission, but which is over-reached by the finding.[8] And it may be rebutted by proof

[1] Hume v. Burton, 1 Ridgw. P. C. 204.
[2] Emery v. Hoyt, 46 Ill. 258.
[3] Pennington v. Thompson, 5 Del. Ch. 328.
[4] Hume v. Burton, 1 Ridgw. P. C. 204.
[5] Christmas v. Mitchell, 3 Ired. Eq. 535.
[6] McCurry v. Hopper, 12 Ala. 823, 46 Am. Dec. 280.
[7] State v. Hyde, 29 Conn. 564.
[8] Hopson v. Boyd, 6 B. Mon. 296; Wall v. Hill, 1 B. Mon. 290, 36 Am. Dec. 578; Harvey v. Sullens, 56 Mo. 372; Gridley v. Boggs, 62 Cal. 201;

of soundness of mind or lucid intervals, and that the act in question was done during such one interval.[1] And an issue may be directed to inquire whether or not he was of unsound mind at the time of the performance of the act.[2] And it may be permitted to be traversed by a party with whom the lunatic contracted.[3] Nor is the petitioner in the inquisition, or other parties to it, estopped from asserting sanity or a lucid interval.[4] The mere fact that an act is over-reached by an inquisition against the party does not render it prima facie invalid.[5] An inquisition finding a party to be insane may be given in evidence, however, as tending to show his insanity at the time of the performance of a previous act;[6] even against strangers who were not parties to the inquisition,[7] and is strongly confirmatory of other evidence of incompetency,[8] shifting the burden of proof to the person asserting the validity of the act.[9] The strength of the presumption of insanity of a testator arising from an inquisition finding him insane is to be measured with a view to all the circumstances attending the

Yauger v. Skinner, 14 N. J. Eq. 389; L'Armoreaux v. Crosby, 2 Paige, 422; Hughes v. Jones, 116 N. Y. 67, 5 L. R. A. 632; Banker v. Banker, 63 N. Y. 409; Van Deusen v. Sweet, 51 N. Y. 378; Demelt v. Leonard, 19 How. Pr. 140; Lewis v. Jones, 50 Barb. 648; Hicks v. Marshall, 8 Hun, 327; Goodell v. Harrington, 3 Thomp. & C. 345; Re Patterson, 4 How. Pr. 35; Klohs v. Klohs, 61 Pa. 245; Imhof v. Witmer, 31 Pa. 243; Titlow v. Titlow, 54 Pa. 224, 93 Am. Dec. 691; Re Gangwere's Estate, 14 Pa. 417, 53 Am. Dec. 554; Willis v. Willis, 12 Pa. 159; Clark v. Caldwell, 6 Watts, 139; Tozer v. Saturlee, 3 Grant, Cas. 162; Wood v. Wood, 4 Brewst. 75; Hutchinson v. Sandt, 4 Rawle, 234, 26 Am. Dec. 127; Bowman v. Van Baum, 17 Phila. 633, 14 W. N. C. 185; Frank v. Mainwaring, 2 Beav. 115.

[1] Hutchinson v. Sandt, 4 Rawle, 234, 26 Am. Dec. 127; Bowman v. Van Baum, 17 Phila. 633, 14 W. N. C. 185.

[2] Frank v. Mainwaring, 2 Beav. 115.

[3] Palmer v. Parkhurst, 1 Ch. Cas. 112; Yauger v. Skinner, 14 N. J. Eq. 389.

[4] Re Gangwere's Estate, 14 Pa. 417, 53 Am. Dec. 554.

[5] Jackson v. King, 4 Cow. 207; Jacobs v. Richards, 18 Beav. 300; Ex parte Bradbury, 3 Jur. 1108.

[6] Nichol v. Thomas, 53 Ind. 43.

[8] Hopson v. Boyd, 6 B. Mon. 296; Wall v. Hill, 1 B. Mon. 290, 36 Am. Dec. 578; Griswold v. Miller, 15 Barb. 523.

[7] Browning v. Reane, 2 Phillim. Eccl. Rep. 69.

[9] Glass v. Hillary, 1 Pa. Dist. R. 628; Goodell v. Harrington, 3 Thomp. & C. 345.

inquisition, and would be greatly diminished by the fact that the proceedings were *ex parte* and no person was present interested in procuring a verdict carrying the lunacy back to the particular period, or to point out to the jury the effect the verdict would have upon the interests of others.[1] And greater effect will be given an adjudication of idiocy of a testator made two years after the execution of his will as evidence of incompetency than would be given an inquisition of lunacy made at such time.[2] And but slight consideration will be given an inquisition of previous unsoundness as against strangers to the inquisition, especially when it does not expressly find the party to have been an idiot from birth.[3] So, a record of the appointment of a guardian for a party will not be considered on the question of the validity of an act performed by him where the proceeding for the appointment was long subsequent to the act.[4] And a finding upon an inquisition of lunacy that a testator had been a lunatic for three years is not conclusive of such lunacy in a proceeding to contest his will made during such three years, and any presumption which it raises is rebutted by proof of testamentary capacity at the time.[5]

But an inquisition finding a grantor to have been a lunatic for twent yyears is sufficient to invalidate a deed during such period made for an inadequate consideration to a person holding a situation of confidence with respect to the grantor.[6]

And one finding a grantor to have been a lunatic for five years is prima facie evidence of incompetency to make a deed, even against a grantee taking a conveyance four years prior to the finding.[7] So, a finding of unsoundness against a grantor fifteen months after the execution of his deed is competent evidence on the question of his competency to make it.[8] And a finding that a grantor had been a lunatic without lucid intervals from a time anterior to the date of his conveyance casts a sufficient cloud upon the purchaser's title to warrant him in coming into equity

[1] Bannatyne v. Bannatyne, 14 Eng. L. & Eq. 581, 16 Jur. 864.
[2] Townsend v. Bogart, 5 Redf. 93.
[3] Hopson v. Boyd, 6 B. Mon. 296.
[4] Hovey v. Chase, 52 Me. 305.
[5] Brady v. McBride, 39 N. J. Eq. 495.
[6] Arnold v. Townsend, 14 Phila. 216.
[7] Bowman v. Van Baum, 17 Phila. 633, 14 W. N. C. 185.
[8] Rider v. Miller, 86 N. Y. 507.

for relief.[1] It has been held, however, that the presumption of business capacity at the time a deed was made is not changed by the fact that on that date an application was made for the appointment of a guardian for the grantor, which was subsequently made.[2] And that an inquisition found against a husband two days after his marriage, declaring him to have been of unsound mind for six months, is only presumptive evidence of incapacity in an action brought to avoid the marriage, and the fact that the wife had notice of the inquisition does not make it conclusive.[3] And that an order appointing a guardian for a testator, though made upon the same day that his will was made, is not prima facie evidence of testamentary incapacity, and is not made so by a recital in the order that he was insane, though such order may be put in evidence as bearing upon his condition;[4] and the submission of the question to the jury in such a case whether the testator was insane the day the will was made and the guardian appointed is objectionable as tending to prepossess the minds of the jury against the will and give undue prominence to the fact of the appointment.[5] So, an inquisition of lunacy is not conclusive evidence of the precise period at which the lunacy commenced.[6] And a decree dismissing a petition for the appointment of a guardian for a person alleged to be insane, and a verdict and judgment on appeal in favor of sanity, are not conclusive thereof in an action subsequently brought for the recovery of land conveyed by him between such decree and verdict, but may be given in evidence as tending to prove sanity.[7] An inquisition has no effect upon the validity of acts performed before the time named in it as that of the commencement of the period of lunacy.[8] In New York the inquiry on an inquisition

[1] Yauger v. Skinner, 14 N. J. Eq. 389.

[2] Doty v. Hubbard, 55 Vt. 278.

[3] Banker v. Banker, 63 N. Y. 409.

[4] Rice v. Rice, 50 Mich. 448, 53 Mich. 432. And see Jones v. Hughes, 15 Abb. N. C. 141.

[5] Rice v. Rice, 53 Mich. 432.

[6] Ex parte Bradbury, 3 Jur. 1108, 4 Dea. 202.

[7] Gibson v. Soper, 6 Gray, 279, 66 Am. Dec. 414.

[8] Sullivan v. Flynn, 9 Mackey, 396; Shirleys v. Taylor, 5 B. Mon. 99; Mutual L. Ins. Co. v. Hunt, 79 N. Y. 541; Rippy v. Gant, 4 Ired. Eq. 443.

der them valid;[1] or that such a consideration had been received that justice and equity would require the enforcement of the obligation.[2] And a will made by a person who had been afflicted with delusions, against whom a commission had issued, which was not superseded, and who had never quitted the asylum, will not be admitted to probate though he appeared to have recovered his sanity and his delusions were no longer apparent, in the absence of clear and convincing proof that he had become sane and capable.[3] Nor will the court on appeal in an action for the appointment of a guardian in which the party was twice adjudged mentally incompetent set aside the findings of the lower courts in the absence of a strong showing of sanity.[4] The fact that a commission *de lunatico inquirendo* was issued against a testator covering the time at which his will was made, however, will not invalidate it where full capacity is shown by the subscribing witnesses and others who give minute accounts of what he said and did at that time.[5] And it need not be capacity to transact business with judgment and discretion, as indiscretion and defects of judgment may coexist with legal capacity.[6] And an inquisition finding a grantor to be a lunatic with lucid intervals, and that he had been in the same state of lunacy for twenty years, cannot overcome testimony as to his sanity at the time of the execution of his deed.[7] Nor will a will of a testator, afterwards found to be of unsound mind from a date anterior to that of the will, be refused probate where there is nothing on its face sounding in folly;[8] or where the disposition was the same as that made by a previous will, when the sanity of the testator was unquestionable.[9] And the fact that a contract is over-reached by an inquisition does not justify setting it aside where it is fair and was made without notice of the incompetency to the other party, especially where the par-

[1] Stevens v. Stevens, 127 Ind. 560; Breed v. Pratt, 18 Pick. 115.
[2] Hicks v. Marshall, 8 Hun, 327.
[3] Grimani v. Draper, 6 Notes of Cases, 418.
[4] Sponable v. Hanson, 87 Mich. 204.
[5] Rodd v. Lewis, 2 Lee, Eccl. Rep. 176.
[6] Wall v. Hill, 1 B. Mon. 290, 36 Am. Dec. 578.
[7] Craig v. Feland, 4 T. B. Mon. 232.
[8] Re Watts, 1 Curt. Eccl. Rep. 594.
[9] Re Pendleton, 1 Connoly, 480.

ties cannot be reinstated,[1] or where the goods procured thereby were suited to the situation of the buyer.[2] So, members of an inquest which found a grantor to be of unsound mind are competent witnesses to prove unsoundness of mind or a lucid interval where the facts are within their knowledge, but they cannot be examined for the purpose of proving their opinions as to the nature of their finding, and what they intended by it,[3] or for the purpose of impeaching the regularity of their finding.[4]

§ 11. *When superseded.*

One who has been adjudged a person of unsound mind and incapable of managing his person and property is entitled to have the commission superseded where he has recovered his mind.[5] The test of recovery which will authorize the discharge of a commission is the return of the natural and healthy state of the emotions, absence of insane ideas and delusions, and a practical and reasonable conduct, and the possession of sufficient powers of attentive memory and judgment to enable the party to take his part as a member of society.[6] It is not necessary that the mind should be restored to its original state, it is sufficient if the party is competent for common purposes, as to make a will of personal estate;[7] the question for the consideration of the jury in a proceeding to set aside a guardianship being, Is the party now of sound mind and capable of managing his estate.[8] It is fitness to manage the common and ordinary affairs of life, however, and not competency proportioned to the extent of the lunatic's estate, which will warrant a discharge of his committee.[9] But a commission in lunacy will not be at once superseded on the ground of the recovery of the lunatic on evidence that he no longer exhib-

[1] Neill v. Morley, 9 Ves. Jr. 478.

[2] Baxter v. Portsmouth, 5 Barn. & C. 171, 2 Car. & P. 178.

[3] Hutchinson v. Sandt, 4 Rawle, 234, 26 Am. Dec. 127; Bowman v. VanBaum, 17 Phila. 633, 14 W. N. C. 185.

[4] Bowman v. VanBaum, 17 Phila. 633, 14 W. N. C. 185.

[5] Greenwade v. Greenwade, 43 Md. 313; Ex parte Drayton, 1 Desauss. Eq. 144; Re Rogers, 5 N. J. Eq. 46.

[6] Re Brugh, 61 Hun, 193.

[7] Re Holyland, 11 Ves. Jr. 10.

[8] Cochran v. Amsden, 104 Ind. 282.

[9] Re Mason, 60 Hun, 46.

ited unsoundness of mind but will be ordered to stand over until it can be seen what will be the effect of the removal of the restraint.[1] And if a person under guardianship is found upon a proceeding to set it aside not to be so far restored to reason as to be capable of understanding all ordinary affairs of life the guardianship will be continued.[2] So, a commission in lunacy will not be superseded where the party is liable at any moment to be excited beyond his power of control, and require constant supervision and care to prevent the squandering of his property, though he at times acts like a sane man.[3] Nor will a commission be superseded where the inquisition had found the party to be a lunatic with lucid intervals, and he had had frequent relapses, but should be suspended for a time to see if recovery is perfect.[4] Nor will a committee be discharged upon a claim that the lunatic had so far recovered as to be able to govern himself, where it does not appear that he was also competent to manage his estate, and no application was made for the discharge of the committee of the estate.[5] And a verdict finding the person incapable of managing his estate is responsive to the issue in a proceeding to set aside a guardianship, and a judgment continuing the guardianship is proper.[6] So the continuance of an insane delusion on the part of a person against whom a commission had issued is sufficient to prevent the court from superseding the commission though its existence was not distinctly manifested.[7]

One who has been adjudged a person of unsound mind and incapable of the management of his person and property must furnish proof of recovery upon an application to have the commission suspended.[8] And the absence of any disorder, especially of a dangerous tendency, must be satisfactorily established by the evidence of persons having competent knowledge of the whole sub-

[1] Re Blackmore, 1 DeG. J. & S. 84. And see Hovey v. Harmon, 49 Me. 269; Re Burr, 2 Barb. Ch. 208; Re Rogers, 5 N. J. Eq. 46.

[2] Cochran v. Amsden, 104 Ind. 282.

[3] Re Helmbold, 12 Phila. 424.

[4] Ex parte Ferrars, Mosely, 332.

[5] Re Burr, 17 Barb. 9.

[6] Cochran v. Amsden, 104 Ind. 282.

[7] Re Dyce Sombre, 13 Jur. 857, 1 Macn. & G. 116.

[8] Greenwade v. Greenwade, 43 Md. 313.

ject, not only as to the present state, but with reference to the former incompetency.[1] And evidence which will warrant the court in superseding a commission is usually required to be stronger in favor of sanity than what would have prevented the commission originally.[2] The most satisfactory proof of recovery is the conviction on the part of the patient of the non-reality of the delusion which arises from his disease.[3] And a complaint in an action by a person under guardianship as of unsound mind in an action brought by him to impeach sales of his property made by the guardian, alleging that such sales occurred before he was released from the disability under which he was held, does not show a termination of the guardianship.[4] The provision of the California Code of Civil Procedure,[5] authorizing the court to restore a person adjudged insane or incompetent, is only applicable to those for whom guardians had been appointed, and cannot be applied to the order of a judge committing a person to the state insane hospital under the provisions of the Political Code.[6]

XVIII. Right to restrain.

§ 1. *General rules as to confinement.*

An alleged lunatic should not be restrained unless the case is a proper one for confinement.[7] Commitment to the hospital for the insane is a very different thing from an inquisition of lunacy, as in such a proceeding the status of the party is fixed as to all the world while the statutory inquiry with reference to confinement in an asylum is restricted to one specific purpose.[8] A person should not be confined in an asylum unless actually insane[9] and his welfare or the safety of others require it,[10] though confinement

[1] Re Holyland, 11 Ves. Jr. 10.
[2] Re Dyce Sombre, 13 Jur. 857, 1 Macn. & G. 116.
[3] Re Dyce Sombre, 13 Jur. 857, 1 Macn. & G. 116.
[4] Robeson v. Martin, 93 Ind. 420.
[5] Cal. Code Civ. Proc. § 1766.
[6] Kellogg v. Cochran, 87 Cal. 192, 12 L. R. A. 104.
[7] Com., Draper, v. Kirkbride, 3 Brewst. 393.
[8] Goodwin v. State, 96 Ind. 550.
[9] Van Deusen v. Newcomer, 40 Mich. 90.
[10] Com., Rubright, v. Western Pa. Hospital, 3 Pittsb. 299; Com., Draper, v. Kirkbride, 3 Brewst. 393; Com., Nyce, v. Kirkbride, 2 Brewst. 400; Anderdon v. Burrows, 4 Car. & P. 210.

of a dangerous lunatic is always justifiable.[1] The right to restrain an insane person has its foundation in reasonable necessity, and an officer cannot arrest such a person without a warrant on the ground of insanity unless he is dangerous to himself or others.[2] But it is just as competent for a magistrate as conservator to order into custody an insane man who is committing a breach of the peace as to order the arrest of a sane person under like circumstances.[3] And a person who is so insane that it would be dangerous to suffer him to be at liberty may be confined from the necessity of the case by any person without a warrant until proper proceedings can be had for the appointment of a guardian.[4] So, a magistrate is not deprived of his authority to commit an insane person whom he believes to be dangerous to an insane asylum by the fact that upon suggestion of insanity before trial under an indictment a commission was appointed to inquire into his mental condition, which reported him insane, and the judge of the criminal court remanded him to prison.[5] But where proceedings are commenced and abandoned, and the imprisonment still continues, the authority is abused and the party causing it becomes a trespasser *ab initio*.[6] No man can be deprived of his liberty without due process of law, whether the alleged cause of detention is insanity or crime.[7] And an adjudication without notice, under which the party is confined, is void where the statute gives him the right to be present at the trial,[8] though proceedings for the confinement of the insane are not in conflict with a constitutional guaranty against deprivation of personal liberty without trial by jury, such provisions applying to criminal prosecutions only.[9] So, the question in an action for damages for restraining a person of his liberty as a

[1] Van Deusen v. Newcomer, 40 Mich. 90; Scott v. Wakem, 3 Fost. & F. 328; Brookshaw v. Hopkins, Lofft, 243.

[2] Look v. Dean, 108 Mass. 116, 11 Am. Rep. 323.

[3] Lott v. Sweet, 33 Mich. 308.

[4] Colby v. Jackson, 12 N. H. 526; Davis v. Merrill, 47 N. H. 208; Van Deusen v. Newcomer, 40 Mich. 90. And see Re Sherman's Petition, 17 R. I. 356.

[5] State, Kennedy, v. Uniacke, 48 La. Ann. 1230.

[6] Colby v. Jackson, 12 N. H. 526.

[7] Com., Stewart, v. Kirkbride, 2 Brewst. 419.

[8] Re Wellman, 3 Kan. App. 100.

[9] Black Hawk County v. Springer, 58 Iowa, 417.

lunatic is whether his safety or that of his family or friends or neighbors requires that he should be restrained, and whether such restraint is necessary for his restoration, or will be conducive thereto.[1] And a person confined in an asylum will be discharged on habeas corpus if the evidence as to his sanity is evenly balanced, unless it be clearly shown that the public peace or morals, or the interests of the person and his family, imperatively demand his detention.[2] That the property of others is endangered by the mental unsoundness of a person at large on bail gives no authority under the Alabama Code, § 1160, providing for an inquiry and the removal to a lunatic asylum of persons in confinement under indictment, to order the confinement of such person therein.[3] And a mere unchangeable belief in things which have no existence, on the part of an ignorant man, is not such insanity as will authorize his confinement in an asylum.[4] But a fixed belief in an unnatural or disgraceful state of affairs, existing beyond and in a direction entirely contrary to the ordinary elements of rational belief without cause, might be sufficient.[5] And a person restrained in an asylum is not entitled to a discharge on habeas corpus where he is imbecile and unable to take care of himself.[6] And one who though originally bright has lost her mind from epilepsy, and become unable to take the slightest care of herself, though not an idiot, is an insane person within the meaning of the provisions of the Iowa Code, for the care of the insane.[7] So, one whose mind is so affected by disease that it is necessary for his own good to put him under restraint is a lunatic within 8 & 9 Vict. chap. 100, § 44, prohibiting the receiving of lunatics into a house not duly licensed or registered.[8] And the finding of a duly appointed commission *de lunatico inquirendo* is not conclusive on the question of the propriety of the confinement of a person in an asylum on a prosecution against her husband for conspiracy to confine her

[1] Hinchman v. Richie, Brightly, 143.
[2] Re Gresh's Case, 12 Pa. Co. Ct. 295.
[3] Ex parte Trice, 53 Ala. 546.
[4] Com., Rubright, v. Western Pa. Hospital, 3 Pittsb. 299.
[5] Com., Rubright, v. Western Pa. Hospital, 3 Pittsb. 299.
[6] Com., Haskell, v. Kirkbride, 3 Brewst. 586.
[7] Speedling v. Worth County, 68 Iowa, 152.
[8] Reg. v. Bishop, 14 Cox, C. C. 404.

in an asylum.[1] And as a general rule the committee of a lunatic should confine him only when authorized to do so by the court.[2] And a statement in a medical certificate upon which a lunatic is confined that the physician had formed his opinion from conversations with her, and the fact that she labored under delusions and was dirty and indecent in the extreme, is sufficient under a statute requiring him to specify the facts upon which his opinion was based.[3]

§ 2. *Discharge from confinement.*

A lunatic who recovers his sanity should be delivered out of custody, and for that purpose may petition to be inspected, but the question of recovery is not to be tried by inspection only, but by examining witnesses upon the question of the probable continuance of the insanity.[4] And while it has been held that the question whether or not restraint would be beneficial is one for the court,[5] the general rule would seem to be that no person can be deprived of his personal liberty without the intervention of a jury;[6] and that in cases of lunacy the verdict of the jury is to be founded, as in other cases, upon satisfactory and unexceptional evidence submitted to their consideration.[7] A person confined upon an allegation of lunacy will be discharged on habeas corpus where it appears that there were no indications of danger to himself or to others or to his estate.[8] But to warrant a discharge of a person acquitted of homicide on the ground of insanity the evidence must show, not only the restoration of sanity, but also that it was safe for the accused to be at large.[9] Sanity is presumed on an application for a discharge from an asylum, and the evidence should preponderate for the respondent to overcome such presumption.[10] And the rule that a doubt on a criminal accusation should be resolved in favor

[1] Com. v. Spink, 137 Pa. 255.
[2] Com., Draper, v. Kirkbride, 3 Brewst. 393.
[3] Re Shuttleworth, 11 Jur. 41.
[4] Ash's Case, Freem. Ch. 259; People, Fullerton, v. Gilbert, 115 Ill. 59.
[5] Com., Draper, v. Kirkbride, 3 Brewst. 393.
[6] Re Dey, 9 N. J. Eq. 181.
[7] Re Dey, 9 N. J. Eq. 181.
[8] Com. v. Kirkbride, 7 Phila. 8; People, Fullerton, v. Gilbert, 115 Ill. 59.
[9] Com., Bickel, v. Bennet, 15 W. N. C. 515.
[10] Com., Hembold, v. Kirkbride, 11 Phila. 427.

of the accused, applies in favor of sanity in a proceeding by habeas corpus for discharge from an asylum.[1] But the court will not reject as erroneous the uncontradicted opinions of unprejudiced experts of high standing that the party is insane, simply because of its inability to detect the existence of mental disorder.[2] And the fact that a lawyer who had been confined in an asylum conducts his own case on habeas corpus with composure and skill is not sufficient to warrant his release where the evidence shows that he is afflicted with paresis, which is attended with mental delusion and is characterized by a tendency to commit acts of violence and aggression; and that at intervals the patient will appear to be quite well but will soon lapse into his former condition.[3] The power to discharge a person alleged to be insane, and received in the state insane asylum, except upon habeas corpus, is vested in California exclusively in the officers of the asylum, which includes the power to determine whether or not he had recovered, and to discharge persons improperly committed; and the effect of such a discharge where no guardian has been appointed is to restore the discharged person to legal capacity.[4] A dangerous lunatic should not be restored to liberty, however, upon the mere ground of informality of the certificates upon which he was confined.[5] Discharge is prima facie evidence of restoration.[6]

[1] Com., Hembold, v. Kirkbride, 11 Phila. 427.
[2] Re Sherman's Petition, 17 R. I. 356.
[3] Com., Norton, v. Chapin, 19 Phila. 551.
[4] Kellogg v. Cochran, 87 Cal. 192, 12 L. R. A. 104.
[5] Re Shuttleworth, 11 Jur. 41. And see Re Latta, 43 Kan. 533.
[6] Haynes v. Swann, 6 Heisk. 560.

CHAPTER X.

EVIDENCE OF INSANITY.

I. PRESUMPTION AND BURDEN OF PROOF.
- § 1. *Presumption of sanity.*
- § 2. *Burden of proof of insanity — generally.*
- § 3. *Burden of proof in criminal cases.*
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II. MEASURE OF PROOF.
- § 1. *Conflicting character of the criminal cases.*
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III. PRESUMPTION OF CONTINUANCE.
- § 1. *Habitual insanity.*
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VI. ATTESTING WITNESSES.
VII. BOOKS.

I. PRESUMPTION AND BURDEN OF PROOF.

§ 1. *Presumption of sanity.*

The rule is universal that everyone is presumed to be sane and of sound mind until the contrary appears.[1] It applies to prosecutions for criminal acts, and every person is presumed to be sane, or to possess a sufficient degree of reason to be responsible for his criminal acts, until the contrary is shown,[2] though he was born deaf and dumb and had never received special religious or

[1] Armstrong v. Timmons, 3 Harr. (Del.) 342; Duffield v. Robeson, 2 Harr. (Del.) 375; Ethridge v. Bennett, 9 Houst. (Del.) 295; Lodge v. Lodge, 2 Houst. (Del.) 419; Doe, Guest, v. Besson, 2 Houst. (Del.) 246; Reeve v. Bonwill, 5 Del. Ch. 1; Humphreys v. State, 45 Ga. 190; Argo v. Coffin, 142 Ill. 368; Menkins v. Lightner, 18 Ill. 282; Montag v. People, 141 Ill. 75; Guild v. Hull, 127 Ill. 523; Chicago W. D. R. Co. v. Mills, 91 Ill. 39; Titcomb v. Vantyle, 84 Ill. 371; Fisher v. People, 23 Ill. 283; Wallis v. Luhring, 134 Ind. 447; Herbert v. Berrier, 81 Ind. 1; Rush v. Megee, 36 Ind. 69; Dearmond v. Dearmond, 12 Ind. 455; State v. Coleman, 27 La. Ann. 691; Chandler v. Barrett, 21 La. Ann. 58, 99 Am. Dec. 701; Higgins v. Carlton, 28 Md. 115, 92 Am. Dec. 666; Ricketts v. Jolliff, 62 Miss. 440; Mullins v. Cottrell, 41 Miss. 291; State v. Wright, 134 Mo. 404; Jackson v. Hardin, 83 Mo. 175; Perkins v. Perkins, 39 N. H. 163; North Brunswick Twp. Bd. of Health v. Lederer, 52 N. J. Eq. 675; Jackson v. King, 4 Cow. 207, 15 Am. Dec. 354; Ean v. Snyder, 46 Barb. 230; Jackson v. Van Duzen, 5 Johns. 144; Delafield v. Parish, 25 N. Y. 9; Odom v. Riddick, 104 N. C. 515, 7 L. R. A. 118; Ballew v. Clark, 2 Ired. L. 23; Pennypacker v. Pennypacker (Pa.) 7 Cent. Rep. 532; Miller v. Rutledge, 82 Va. 863; Hiett v. Shull, 36 W. Va. 563; McNaghten's Case, 10 Clark & F. 200; Long v. Long, 4 Ir. Ch. 106; Groom v. Thomas, 2 Hagg. Eccl. Rep. 433.

[2] McKenzie v. State, 26 Ark. 334; People v. McNulty, 93 Cal. 427; People v. Travers, 88 Cal. 233; State v. Reidell, 9 Houst. (Del.) 470; State v. Harrigan, 9 Houst. (Del.) 369; State v. Draper, 1 Houst. Crim. Rep. 291;

moral instructions.[1] And where there is no evidence tending to show insanity at the time of the offense, the action of the court in refusing or giving instructions on the subject of insanity will not be reviewed on appeal.[2] Nor is an instruction in a criminal action that every man is supposed to be sane and responsible for his acts until the contrary is shown, together with one as to the burden of proof, objectionable as making the presumption of sanity and the burden of proving insanity too prominent,[3] though the presumption of sanity does not absolutely control the jury.[4]

So, the presumption of sanity applies to contracts, and the competency and capacity of the parties to a contract regularly

State v. Thomas, 1 Houst. Crim. Rep. 511; Beck v. State, 76 Ga. 452; Danforth v. State, 75 Ga. 614, 58 Am. Rep. 480; Holsenbake v. State, 45 Ga. 55; Carr v. State, 96 Ga. 284; People v. Walter, 1 Idaho, 386; Jamison v. People, 145 Ill. 357; Langdon v. People, 133 Ill. 382; Sanders v. State, 94 Ind. 147; Guetig v. State, 66 Ind. 94, 32 Am. Rep. 99; Greenley v. State, 60 Ind. 141; Phelps v. Com. 17 Ky. L. Rep. 706; Moore v. Com. 92 Ky. 630; State v. Scott, 49 La. Ann. 253, 36 L. R. A. 721; State v. Lawrence, 57 Me. 574; Com. v. Heath, 11 Gray, 303; People v. Garbutt, 17 Mich. 9, 97 Am. Dec. 162; Newcomb v. State, 37 Miss. 383; State v. Redemeier, 71 Mo. 173, 36 Am. Rep. 462; State v. Hundley, 46 Mo. 414; State v. Klinger, 43 Mo. 127; State v. McCoy, 34 Mo. 536, 86 Am. Dec. 121; State v. Martin (N. J.) 3 Crim. L. Mag. 44; Graves v. State, 45 N. J. L. 347, 46 Am. Rep. 778; Brotherton v. People, 75 N. Y. 159; Walter v. People, 32 N. Y. 147; O'Connell v. People, 87 N. Y. 377, 41 Am. Rep. 379; People v. Pine, 2 Barb. 566; People v. O'Connell, 62 How. Pr. 436; People v. Casey, 2 N. Y. Crim. Rep. 187; Walker v. People, 1 N. Y. Crim. Rep. 7, 22; People v. Coleman, 1 N. Y. Crim. Rep. 1; People v. Kirby, 2 Park. Crim. Rep. 28; People v. Robinson, 1 Park. Crim. Rep. 649; Lake v. People, 1 Park. Crim. Rep. 495; State v. Starling, 6 Jones, L. 366; State v. Kalb, 2 Ohio Leg. News, 364; Loeffner v. State, 10 Ohio St. 598; Com. v. Woodley, 166 Pa. 463; Com. v. Werling, 164 Pa. 559; Coyle v. Com. 100 Pa. 573, 45 Am. Rep. 397; Nevling v. Com. 98 Pa. 322; Com. v. Farkin, 3 Pa. L. J. 480; Com. v. Sayres, 12 Phila. 553; Com. v. Lynch, 3 Pittsb. 412; King v. State, 91 Tenn. 617; Carter v. State, 12 Tex. 500, 62 Am. Dec. 539; Smith v. State, 22 Tex. App. 316; Giebel v. State, 28 Tex. App. 151; Clark v. State, 8 Tex. App. 350; Webb v. State, 5 Tex. App. 596; People v. Dillon, 8 Utah, 92; United States v. Guiteau, 10 Fed. Rep. 161; United States v. McGlue, 1 Curt. C. C. 1; McNaghten's Case, 10 Clark & F. 200.

[1] State v. Draper, 1 Houst. Crim. Rep. 291.

[2] State v. Hartley, 22 Nev. 342, 28 L. R. A. 33.

[3] Massengale v. State, 24 Tex. App. 181.

[4] Davis v. United States, 160 U. S. 469, 40 L. ed. 499.

made are presumed.[1] And one who is competent to contract will be presumed to have sufficient mental capacity to marry.[2] And a grantor in a deed is presumed to be sane and competent at the time of its execution.[3] And evidence, in an action to set aside a deed, of the sanity of the grantor, is not admissible where no evidence as to his insanity had been given.[4] So, when a purchaser sees a regular chain of title, formal in all its parts, upon the registration books, executed by grantors of full age, he has a right to rely upon the presumption of sanity, and will be protected if he purchases without notice for a fair consideration.[5]

Old age or physical infirmity raises no presumption of incapacity to make a deed or contract.[6]

So, a person making a will is presumed to have been possessed of a sound and disposing mind at the time.[7] And a sane testator

[1] Killian v. Badgett, 27 Ark. 166; State v. Geddis, 42 Iowa, 268; Fay v. Burditt, 81 Ind. 433, 42 Am. Rep. 142; Dorchester v. Dorchester, 3 N. Y. Supp. 238, Reversed on other grounds, 121 N. Y. 156.

[2] Powell v. Powell, 27 Miss. 783.

[4] Killian v. Badgett, 27 Ark. 166; Doe, Guest, v. Beeson, 2 Houst. (Del.) 246; English v. Porter, 109 Ill. 285; Titcomb v. Vantyle, 84 Ill. 371; Dearmond v. Dearmond, 12 Ind. 455; Achey v. Stephens, 8 Ind. 411; Buckey v. Buckey, 38 W. Va. 168; Jarrett v. Jarrett, 11 W. Va. 584; Anderson v. Cranmer, 11 W. Va. 562; Hoge v. Fisher, 1 Pet. C. C. 163.

[3] Dearmond v. Dearmond, 12 Ind. 455.

[5] Odom v. Riddick, 104 N. C. 515, 7 L. R. A. 118.

[6] Williams v. Haid, 118 N. C. 481; Cowee v. Cornell, 75 N. Y. 91, 31 Am. Rep. 428; Lewis v. Pead, 1 Ves. Jr. 19.

[7] O'Donnell v. Rodiger, 76 Ala. 222, 52 Am. Rep. 322; Panaud v. Jones, 1 Cal. 488; Bell v. Buckmaster, 1 Harr. (Del.) 460, note; Jamison v. Jamison, 3 Houst. (Del.) 108; Cordrey v. Cordrey, 1 Houst. (Del.) 269; Holloway v. Galloway, 51 Ill. 159; Wilber v. Wilber, 129 Ill. 392; Herbert v. Berrier, 81 Ind. 1; Brown v. Ward, 53 Md. 393, 36 Am. Rep. 422; Higgins v. Carlton, 28 Md. 115, 92 Am. Dec. 666; Payne v. Banks, 32 Miss. 292; Jackson v. Hardin, 83 Mo. 175; Pettes v. Bingham, 10 N. H. 515; Smith v. Smith, 48 N. J. Eq. 566; McCoon v. Allen, 45 N. J. Eq. 708; Elkinton v. Brick, 44 N. J. Eq. 154, 1 L. R. A. 161; Boylan v. Meeker, 28 N. J. L. 274; Den, Trumbull, v. Gibbons, 22 N. J. L. 117; Turner v. Cheesman, 15 N. J. Eq. 243; Whitenack v. Stryker, 2 N. J. Eq. 8; Jackson v. Van Duzen, 5 Johns. 144, 4 Am. Dec. 330; Jones v. Jones, 43 N. Y. S. R. 434; Delafield v. Parish, 25 N. Y. 9; Potter v. McAlpine, 3 Dem. 108; Newhard v. Yundt, 132 Pa. 324; Egbert v. Egbert, 78 Pa. 326; Thompson v. Kyner, 65 Pa. 368; Werstler v. Custer, 46 Pa. 502; Grabill v. Barr, 5 Pa. 441, 47 Am. Dec. 418;

is presumed to be sane when subsequent alterations are made.[1] But a refusal to instruct in a will contest that everyone is presumed to be sane until the contrary is proved is not error where the jury were told that they should find for the will on the question of testamentary capacity, unless it was shown that the testator was so unsound of mind at the time as to be incapable of managing his affairs.[2] The presumption is not usually so strong, however, as in case of deeds and contracts,[3] though it extends through life no matter to what age the testator lives.[4] So, everyone is presumed to have capacity to contract marriage.[5] And sanity is presumed on an application for a discharge from an asylum on habeas corpus.[6] But a bargain between a lunatic or person of unsound mind and another standing in a fiduciary or confidential relation with him is presumed to be against justice, and necessitates proof of knowledge and fairness.[7] The presumption of sanity is not one of law, but of fact, or at least a mixed presumption of law and fact.[8]

No presumption of incompetency to make a valid will or gift arises from the mere fact of advanced age and increasing physical disease which had weakened the donor's mind, and which within three months afterwards resulted in his death.[9] Nor does any presumption of insanity arise from a disposition different from what a jury would make, or from what the law would make in case of intestacy.[10]

Landis v. Landis, 1 Grant, Cas. (Pa.) 248; Heister v. Lynch, 1 Yates, 108; Philadelphia Trust & S. D. Co. v. Drinkhouse, 17 Phila. 23; Re Taylor's Estate, 16 Phila. 274; Keating's Appeal, 19 Pittsb. L. J. N. S. 282; Lee v. Lee, 4 McCord, L. 183, 17 Am. Dec. 722; Kinlock v. Palmer, 1 Mill. Const. 216; Denny v. Pinney, 60 Vt. 524; Dean v. Dean, 27 Vt. 746; Burton v. Scott, 3 Rand. 399; Re Cole's Will, 49 Wis. 179; Brown v. Bruce, 19 C. C. Q. B. 35. And see Sutton v. Sadler, 3 Jur. N. S. 1150.

[1] Hawkins v. Grimes, 13 B. Mon. 257.

[2] Elliott v. Walby, 13 Mo. App. 19.

[3] Beaubien v. Cicotte, 8 Mich. 9. And see Turner v. Turner, 1 Litt. 102.

[4] Higgins v. Carlton, 28 Md. 115, 92 Am. Dec. 666.

[5] Harrod v. Harrod, 1 Kay & J. 4, 18 Jur. 853.

[6] Com., Helmbold, v. Kirkbride, 11 Phila. 427.

[7] Jacox v. Jacox, 40 Mich. 473, 29 Am. Rep. 547; Haydock v. Haydock, 34 N. J. Eq. 570.

[8] Sutton v. Sadler, 3 C. B. N. S. 87.

[9] Williams v. Haid, 118 N. C. 481; Re Wheeler, 5 Misc. 279.

[10] Henry v. Hall, 106 Ala. 84.

§ 2. *Burden of proof of insanity—generally.*

The general rule is laid down, in accord with the presumption that all persons are sane, that the burden of proof rests with him who alleges insanity or unsoundness of mind to establish it.[1] One who seeks to avoid the consequences of his conduct, and charge another with liability for a result to which such conduct contributed, is bound to show that he was not responsible for his own acts, and that such person was under duty of dealing with him as one incompetent to care for himself.[2] Thus, the burden of proof in an action to avoid a contract upon the ground of want of understanding of the nature and consequences of the act upon the part of the party rests with the person alleging it.[3] And the same rule applies to proof of incapacity to give a release,[4] or make an assignment.[5] And the rule is the same whether the insanity was general or partial,[6] or temporary.[7]

So, the burden of showing incompetency to make a deed devolves upon the party objecting to its validity,[8] unless a previous

[1] Frazer v. Frazer, 2 Del. Ch. 260; Argo v. Coffin, 142 Ill. 368; Menkins v. Lightner, 18 Ill. 282; Guild v. Hull, 127 Ill. 523; Ricketts v. Jolliff, 62 Miss. 440; Jackson v. King, 4 Cow. 207, 15 Am. Dec. 354; Delafield v. Parish, 25 N. Y. 9; Jackson v. Van Dusen, 5 Johns. 144, 4 Am. Dec. 330; Ean v. Snyder, 46 Barb. 230; Cincinnati Street R. Co. v. Wright, 54 Ohio St. 181, 32 L. R. A. 340; Com., Haskell, v. Haskell, 2 Brewst. 491; Pennypacker v. Pennypacker (Pa.) 7 Cent. Rep. 532; Burton v. Scott, 3 Rand. 399; Hall v. Unger, 2 Abb. U. S. 507; Attorney General v. Parnther, 3 Bro. Ch. 441. And see Smith v. McClure, 146 Ind. 123.

[2] Worthington v. Mencer, 96 Ala. 310, 17 L. R. A. 407; Reeve v. Bonwill, 5 Del. Ch. 1.

[3] White v. Farley, 81 Ala. 563; Fay v. Burditt, 81 Ind. 433, 42 Am. Rep. 142; State v. Geddis, 42 Iowa, 268; Day v. Seeley, 17 Vt. 542; Hiett v. Shull, 36 W. Va. 563; Menkins v. Lightner, 18 Ill. 282.

[4] Swayze v. Swayze, 37 N. J. Eq. 180; Chicago W. D. R. Co. v. Mills, 91 Ill. 39.

[5] Dorchester v. Dorchester, 3 N. Y. Supp. 238, reversed on other grounds, 121 N. Y. 156.

[6] Wray v. Wray, 32 Ind. 126.

[7] Chicago W. D. R. Co. v. Mills, 91 Ill. 39.

[8] Doe, Guest, v. Beeson, 2 Houst. (Del.) 246; Chancellor v. Donnell, 95 Ala. 342; Dicken v. Johnson, 7 Ga. 484; Guild v. Warne, 149 Ill. 105; Kimball v. Cuddy, 117 Ill. 213; English v. Porter, 109 Ill. 285; Titcomb v. Vantyle, 84 Ill. 371; Achey v. Stephens, 8 Ind. 411; Howe v. Howe, 99

condition of insanity has been established.[1] Thus, the burden of proving the insanity of a person since deceased, for the purpose of vacating a deed made by him, rests with his heirs who attack it.[2] And insanity must be established by the conservator of an insane person who brings an action to set aside a conveyance made by his ward.[3] And the burden of proof of incompetency of a mortgagor rests with the party bringing an action to set the mortgage aside on that ground.[4] So, an instruction in an action to set aside a deed, in effect that if the mortgagor was a person of weak mind it would be sufficient to avoid it unless the defendant could show that notwithstanding such weakness he had sufficient capacity to understand the nature of the contract, is erroneous as changing the burden of proof.[5] But one that if the grantor had sufficient capacity to clearly comprehend the nature of the business, and that he consented of his own volition, they must find for the plaintiff, is not subject to objection as misleading into the belief that the burden of proof was on the defendant, where it appears that the grantor was insane shortly before the execution of the deed.[6] So, one who deals with a man known to be of weak intellect has the burden of proof to show that no undue advantage was taken, and that the dealings were had deliberately and with knowledge of all the circumstances connected with them.[7] And the burden rests with a grantee taking a conveyance from a person of unsound mind to show that he accepted it in ignorance of such unsoundness.[8]

Mass. 88; Gibbons v. Dunn, 46 Mich. 146; Brown v. Brown, 39 Mich. 792; Ballew v. Clark, 2 Ired. L. 23; Cropp v. Cropp, 88 Va. 753; Jarrett v. Jarrett, 11 W. Va. 584; Anderson v. Cranmer, 11 W. Va. 562; Hoge v. Fisher, 1 Pet. C. C. 163; Greenslade v. Dare, 20 Beav. 284.

[1] Buckey v. Buckey, 38 W. Va. 168. And see Cropp v. Cropp, 88 Va. 753.

[2] Pike v. Pike, 104 Ala. 642.

[3] Pickerell v. Morss, 97 Ill. 220.

[4] Gates v. Cornett, 72 Mich. 435.

[5] Somers v. Pumphrey, 24 Ind. 231.

[6] Fishburne v. Ferguson, 84 Va. 87.

[7] Gates v. Cornett, 72 Mich. 435; Van Pelt v. Van Pelt, 30 Barb. 134; Clark v. Malpas, 31 Beav. 80; Lin v. Lindhardt, 127 Mo. 271. And see Weir v. Fitzgerald, 2 Bradf. 42; Mowry v. Silber, 2 Bradf. 133.

[8] Hull v. Louth, 109 Ind. 315, 58 Am. Rep. 405.

So, the burden of proof in an action to set aside a gift upon the ground of mental weakness of a donor rests with the complainant.[1] And the burden of showing that a party to a marriage contract was incapable of understanding its nature at the time, and what she was doing, rests with the party impeaching its validity.[2] But one claiming the validity of a marriage entered into by one who had been adjudged a lunatic has the burden of proof of a lucid interval or of ratification.[3] The burden of proof of capacity rests with an insurance company issuing a policy conditioning for cancelation upon a return of the premiums;[4] or that it shall be void[5] in case of death by his own hand. The general rule with reference to burden of proof of insanity is not universally applied in criminal prosecutions and proceedings with reference to wills, and these have been made the subject of separate sections.[6]

§ 3. *Burden of proof in criminal cases.*

A great majority of the cases hold that the plea of insanity in a criminal prosecution is an affirmative defense, and that it devolves upon the accused to prove that he was insane and incapable of rational action to such an extent as to render him irresponsible at the time,[7] or that he had not moral power to resist the

[1] Kimball v. Cuddy, 117 Ill. 213.

[2] Cannon v. Smalley, L. R. 10 Prob. Div. 96; Harrod v. Harrod, 1 Kay & J. 4, 18 Jur. 853; Browning v. Reane, 2 Phillim. Ecl. Rep. 69.

[3] Goodheart v. Ransley, 28 Ohio L. J. 227.

[4] Stormont v. Waterloo L. & Casualty Assur. Co. 1 Fost. & F. 22.

[5] Schultz v. Insurance Co. 40 Ohio St. 217, 48 Am. Rep. 676.

[6] See *infra*, sections 3 and 4.

[7] Casat v. State, 40 Ark. 511; Bolling v. State, 54 Ark. 588; McKenzie v. State, 26 Ark. 334; People v. Ward, 105 Cal. 335; People v. Schmitt, 106 Cal. 48; People v. Bemmerly, 98 Cal. 299; People v. McNulty, 93 Cal. 427; People v. Bawden, 90 Cal. 195; People v. Travers, 88 Cal. 233; People v. Myers, 20 Cal. 518; People v. Bell, 49 Cal. 485; People v. McDonell, 47 Cal. 137; People v. McCarthy, 115 Cal. 255; State v. Hoyt, 47 Conn. 518, 36 Am. Rep. 89; State v. Hoyt, 46 Conn. 330; State v. Reidell, 9 Houst. (Del.) 470; State v. Harrigan, 9 Houst. (Del.) 369; State v. Pratt, 1 Houst Crim. Rep. 249; State v. Danby, 1 Houst. Crim. Rep. 166; State v. Thomas, 1 Houst. Crim. Rep. 511; Carr v. State, 96 Ga. 284; Humphreys v. State, 45 Ga. 190; Beck v. State, 76 Ga. 452; Danforth v. State, 75 Ga. 614, 58 Am. Rep. 480; People v. Walter, 1 Idaho, 386; Sanders v. State, 94 Ind. 147; State v. Jones, 64 Iowa, 356; Phelps v. Com. 17 Ky. L. Rep. 707; Moore v. Com. 92 Ky. 630; State v. Clements, 47 La. Ann. 1088; State v.

impulse to commit the crime,[1] unless such incapacity appears from the evidence offered by the prosecution.[2] And where the accused offers no testimony tending to show insanity, the presumption in favor of sanity remains unrebutted,[3] and the penalty of the law must be adjudged against him.[4] So, the burden rests with the

De Rancé, 34 La. Ann. 186, 44 Am. Rep. 426; State v. Scott, 49 La. Ann. 253, 36 L. R. A. 721; State v. Lawrence, 57 Me. 574; Com. v. Eddy, 7 Gray, 583; State v. Brown, 12 Minn. 538; Bonfanti v. State, 2 Minn. 123; State v. Duestrow (Mo.) 38 S. W. 554; State v. Schaefer, 116 Mo. 96; State v. Pagels, 92 Mo. 300; State v. Bell, 136 Mo. 120; State v. Lewis, 136 Mo. 84; State v. Johnson, 91 Mo. 439; State v. Redemeier, 71 Mo. 173, 36 Am. Rep. 462; State v. Smith, 53 Mo. 267; State v. Hundley, 46 Mo. 414; State v. Klinger, 43 Mo. 127; State v. McCoy, 34 Mo. 536, 86 Am. Dec. 121; State v. Lewis, 20 Nev. 333; State v. Martin (N. J.) 3 Crim. L. Mag. 44; Graves v. State, 45 N. J. L. 347, 46 Am. Rep. 778; Faulkner v. Territory, 6 New Mex. 464; Brotherton v. People, 75 N. Y. 159; Walter v. People, 32 N. Y. 147; People v. Pine, 2 Barb. 566; People v. O'Connell, 62 How. Pr. 436; People v. Casey, 2 N. Y. Crim. Rep. 187; Walker v. People, 1 N. Y. Crim. Rep. 7; People v. Coleman, 1 N. Y. Crim. Rep. 1; People v. Robinson, 1 Park. Crim. Rep. 649, Affirmed 2 Park. Crim. Rep. 235; Lake v. People, 1 Park. Crim. Rep. 495; State v. Norwood, 115 N. C. 791; State v. Starling, 6 Jones, L. 366; State v. Payne, 86 N. C. 609; State v. Leuth, 5 Ohio C. C. 94; Bergin v. State, 31 Ohio St. 111; Silvus v. State, 22 Ohio St. 90; Loeffner v. State, 10 Ohio St. 598; State v. O'Grady, 3 Ohio Leg. News, 137; Cottell v. State, 12 Ohio C. C. 467; Kelch v. State, 55 Ohio St. 146; Com. v. Bezek, 168 Pa. 603; Com. v. Werling, 164 Pa. 559; Coyle v. Com. 100 Pa. 573, 45 Am. Rep. 397; Nevling v. Com. 98 Pa. 323; Sayres v. Com. 88 Pa. 291; Com. v. Farkin, 3 Pa. L. J. 480; Com. v. Winnemore, 1 Brewst. 356; Com. v. Moss, 6 Kulp, 31; Com. v. Sayres, 12 Phila. 553; Com. v. Lynch, 3 Pittsb. 412; Hall v. Com. 22 W. N. C. 25; State v. McIntosh, 39 S. C. 97; State v. Coleman, 20 S. C. 441; King v. State, 91 Tenn. 617; Dove v. State, 3 Heisk. 348; Leache v. State, 22 Tex. App. 279, 58 Am. Rep. 638; Mendiola v. State, 18 Tex. App. 462; King v. State, 9 Tex. App. 515; People v. Dillon, 8 Utah, 92; People v. Calton, 5 Utah, 451; Baccigalupo v. Com. 33 Gratt. 807, 36 Am. Rep. 795; Davis v. United States, 160 U. S. 469, 40 L. ed. 499; Guiteau's Case, 10 Fed. Rep. 161; United States v. Lancaster, 7 Biss. 440; United States v. Lawrence, 4 Cranch, C. C. 514; Reg. v. Layton, 4 Cox, C. C. 149; Reg. v. Stokes, 3 Car. & K. 185; Reg. v. Townley, 3 Fost. & F. 839; Kinlock's Case, 25 How. St. Tr. 981, 997.

[1] Brown v. Com. 78 Pa. 122.

[2] State v. Danby, 1 Houst. Crim. Rep. 166; People v. Calton, 5 Utah, 451.

[3] State v. Norwood, 115 N. C. 791; Lake v. People, 1 Park. Crim. Rep. 495; Nevling v. Com. 98 Pa. 323; United States v. Lawrence, 4 Cranch, C. C. 514; McDougal v. State (Ind.) 4 Crim. L. Mag. 500.

[4] McKenzie v. State, 23 Ark. 334; Reg. v. Stokes, 3 Car. & K. 185.

defendant in an appellate court on appeal from a conviction in a criminal case in which it was found that he was not insane to show that there was sufficient evidence in favor of the defense.[1] And the burden rests with the accused to show his insanity upon an inquiry as to his sanity at the time he is brought up to plead to the indictment or for trial.[2] And an instruction in a criminal prosecution that everyone is presumed to be sane and responsible, and that the burden rests with the defendant to show insanity, is not objectionable as making the burden of proving insanity too prominent.[3]

Upon the other hand, the rule is laid down by authorities of great weight that the plea of insanity as a defense in a criminal prosecution is merely a denial of one of the essential allegations against the accused, and does not cast the burden of proof of its existence upon him;[4] and that sanity is an ingredient in the crime as essential as the overt act, and that the burden of proof when testimony has been given tending to prove it rests with the prosecution to show sanity.[5] Under this rule, in the absence of evidence indicating insanity, both the court and the jury are justified in acting upon the presumption of sanity, and when the evidence establishes the criminal act and indicates nothing as to the mental capacity of the accused, a conviction is authorized.[6] And the state is not required, in the first instance, to introduce evidence to prove sanity.[7] But whenever the question of sanity is put in issue by facts coming from either side which raise a reasonable

[1] Hoard v. State, 15 Lea, 318.

[2] State v. O'Grady, 3 Ohio Leg. News, 137; United States v. Lancaster, 7 Biss. 440; Reg. v. Lurton, 6 Cox, C. C. 385.

[3] Massengale v. State, 24 Tex. App. 181.

[4] Hopps v. People, 31 Ill. 385, 83 Am. Dec. 231.

[5] Davis v. United States, 160 U. S. 469, 40 L. ed. 499; Russell v. State, 53 Miss. 367; Ford v. State, 73 Miss. 734, 35 L. R. A. 117; Ballard v. State, 19 Neb. 610; Wright v. People, 4 Neb. 407; Moett v. People, 85 N. Y. 373; Brotherton v. People, 75 N. Y. 159; O'Connell v. People, 87 N. Y. 377, 41 Am. Rep. 379; Montag v. People, 141 Ill. 75; State v. Felter, 32 Iowa. 49; Barber's Appeal, 63 Conn. 393, 22 L. R. A. 90.

[6] Armstrong v. State, 30 Fla. 170, 17 L. R. A. 484; Ford v. State, 73 Miss. 117, 35 L. R. A. 117; O'Connell v. People, 87 N. Y. 377, 41 Am. Rep. 379; Brotherton v. People, 75 N. Y. 159; McDougal v. State (Ind.) 4 Crim. L. Mag. 509; Com. v. Eddy, 7 Gray, 583.

[7] State v. Crawford, 11 Kan. 32.

doubt of sanity it devolves upon the people to establish it.[1] Though an instruction that the defendant is presumed to be sane until he convinces the jury by the evidence that he is insane is not error where he has been tried upon the theory that the burden rests with the prosecution to maintain his sanity.[2] So, as a general rule the burden of proof is regarded as remaining with the government throughout the entire case,[3] the legal presumption being regarded as merely a matter of evidence standing upon the same ground as the testimony of the witnesses, not shifting the burden of proof in the sense of changing the rule as of the quantity of evidence, but being merely prima facie proof of sanity upon which the jury could find a verdict,[4] though it cannot be weighed against any measurable amount of evidence.[5] In Illinois and Indiana, however, it is held that where evidence is produced sufficient to raise a reasonable doubt of the defendant's sanity the presumption of sanity ceases, and the burden shifts to the prosecution, which is then required to prove sanity as a necessary element to constitute the crime.[6] So, the defendant in a prosecution for homicide, who does not deny the killing, but sets up insanity as a defense, is not thereby entitled to the opening and closing arguments, as the burden of proof to establish a malicious intent still remains with the state.[7]

[1] Montag v. People, 141 Ill. 75; People v. Fisher, 23 Ill. 293; Barber's Appeal, 63 Conn. 393, 22 L. R. A. 90; State v. Crawford, 11 Kan. 32; People v. Garbutt, 17 Mich. 9, 97 Am. Dec. 162; Cunningham v. State, 56 Miss. 269, 31 Am. Rep. 360; Furst v. State, 31 Neb. 403; Com. v. Heath, 11 Gray, 303; O'Connell v. State, 87 N. Y. 377, 41 Am. Rep. 379. And see Lilly v. People, 148 Ill. 467; Jamison v. People, 145 Ill. 357; State v. Morphy, 33 Iowa, 270, 11 Am. Rep. 122.

[2] O'Connell v. People, 87 N. Y. 377, 41 Am. Rep. 379.

[3] Davis v. United States, 160 U. S. 469, 40 L. ed. 499; Com. v. McKie, 1 Gray, 61, 61 Am. Dec. 410; People v. Garbutt, 17 Mich. 9, 97 Am. Dec. 162; State v. Bartlett, 43 N. H. 224, 80 Am. Dec. 154; McAllister v. Territory, 1 Wash. Terr. 360.

[4] State v. Bartlett, 43 N. H. 224, 80 Am. Dec. 154. And see McAllister v. Territory, 1 Wash. Terr. 360.

[5] State v. Jones, 64 Iowa, 356. And see Barber's Appeal, 63 Conn. 393, 22 L. R. A. 90.

[6] Jamison v. People, 145 Ill. 357; Bradley v. State, 3 Ind. 492.

[7] State v. Felter, 32 Iowa, 52.

§ 4. *Burden of proof in will cases.*

The rule is laid down by a large number of the cases that the burden of proof in a will contest, of unsoundness of mind or testamentary incapacity, rests with those who contest the will,[1] and they have the right to open and close.[2] And the burden of proving a delusion, aberration, or weakness of the mind rests with the contestant.[3] Within this rule express proof of the capacity of a

[1] O'Donnell v. Rodiger, 76 Ala. 222, 52 Am. Rep. 322; Cotton v. Ulmer, 45 Ala. 378, 6 Am. Rep. 703; Eastis v. Montgomery, 95 Ala. 486; Stubbs v. Houston, 33 Ala. 555; Murphree v. Senn, 107 Ala. 424; Knox v. Knox, 95 Ala. 495; McCulloch v. Campbell, 49 Ark. 367; Clements v. McGinn (Cal.) 33 Pac. 920; Panaud v. Jones, 1 Cal. 488; Jamison v. Jamison, 3 Houst. (Del.) 108; Lodge v. Lodge, 2 Houst. (Del.) 419; Chandler v. Ferris, 1 Harr. (Del.) 454; Duffield v. Robeson, 2 Harr. (Del.) 375; Bell v. Buckmaster, 1 Harr. (Del.) 460, note; Teegarden v. Lewis, 145 Ind. 98; Blough v. Parry, 144 Ind. 463; Stephenson v. Stephenson, 62 Iowa, 163; Re Coffman's Will, 12 Iowa, 491; Taylor v. Creswell, 45 Md. 422; Tyson v. Tyson, 37 Md. 567; Higgins v. Carlton, 28 Md. 115, 92 Am. Dec. 666; Brown v. Ward, 53 Md. 393, 36 Am. Rep. 422; Baxter v. Abbott, 7 Gray, 71; Brooks v. Barrett, 7 Pick. 94; Prentis v. Bates, 88 Mich. 567; Mullins v. Cottrell, 41 Miss. 291; Payne v. Banks, 32 Miss. 292; Pettes v. Bingham, 10 N. H. 515; Perkins v. Perkins, 39 N. H. 163; Elkinton v. Brick, 44 N. J. Eq. 154, 1 L. R. A. 161; Turner v. Cheesman, 15 N. J. Eq. 243; Sloan v. Maxwell, 3 N. J. Eq. 563; Goble v. Grant, 3 N. J. Eq. 629; McCoon v. Allen, 45 N. J. Eq. 708; Whitenack v. Stryker, 2 N. J. Eq. 8; Den, Trumbull, v. Gibbons, 22 N. J. L. 117, 51 Am. Dec. 253; Brown v. Torrey, 24 Barb. 583; Legg v. Myer, 5 Redf. 628; Harper v. Harper, 1 Thomp. & C. 351; Miller v. White, 5 Redf. 320; Potter v. McAlpine, 3 Dem. 108; Mayo v. Jones, 78 N. C. 402; Horah v. Knox, 87 N. C. 490; Chrisman v. Chrisman, 16 Or. 127; Greenwood v. Cline, 7 Or. 26; Grubbs v. McDonald, 91 Pa. 236; Egbert v. Egbert, 78 Pa. 326; Thompson v. Kyner, 65 Pa. 368; McMasters v. Blair, 29 Pa. 298; Grabill v. Barr, 5 Pa. 441, 47 Am. Dec. 418; Philadelphia Trust & S. D. Co. v. Drinkhouse, 17 Phila, 23; Landis v. Landis, 1 Grant, Pa. 248; Kinlock v. Palmer, 1 Mill, Const. 215; Lee v. Lee, 4 McCord, L. 183, 17 Am. Dec. 722; Bartee v. Thompson, 8 Baxt. 508; Puryear v. Reese, 6 Coldw. 21; Cox v. Cox, 4 Sneed, 87; Ford v. Ford, 7 Humph. 92; Gass v. Gass, 3 Humph. 278; Dean v. Dean, 27 Vt. 746; Burton v. Scott, 3 Rand. 399; Allen v. Griffin, 69 Wis. 529; Re Cole's Will, 49 Wis. 179; Cartwright v. Cartwright, 1 Phillim. Eccl. Rep. 90; Dew v. Clark, 3 Add. Eccl. Rep. 79; Groom v. Thomas, 2 Hagg. Eccl. Rep. 433.

[2] Chandler v. Ferris, 1 Harr. (Del.) 454; Bell v. Buckmaster, 1 Harr. (Del.) 460, note.

[3] Allen v. Public Administrator, 1 Bradf. 378; Keeler v. Keeler, 20 N. Y. S. R. 433.

testator is not required in the absence of a contest, as in such case the natural presumption of competency will prevail.[1] And where a will is contested on the ground of insanity the proponent is only required to prove the fact of formal execution when the burden of overturning the presumption of sanity is cast upon the contestants.[2] Though it has been held that evidence of sanity is necessary.[3] And when competency is assailed it is competent for the proponent to recall the subscribing witnesses to sustain it.[4] Where the attesting witnesses do not impeach the testator's sanity, or if, being absent or dead, their handwriting is proved, the will will be regarded as established unless proof of insanity is offered by the contestants.[5]

Upon the other hand, the contrary rule has been repeatedly affirmed by authorities of great weight, creating in some instances an irreconcilable conflict of authority in the same state. Under this rule the sanity of a testator at the time of the execution of his will is regarded as an affirmative fact to be established in a proceeding to contest his will by those affirming its validity;[6] and

[1] Herbert v. Berrier, 81 Ind. 1; Perkins v. Perkins, 39 N. H. 163; Smith v. Smith, 4 Baxt. 293; Hawkins v. Grimes, 13 B. Mon. 257.

[2] Titlow v. Titlow, 54 Pa. 216, 93 Am. Dec. 691; Werstler v. Custer, 46 Pa. 502; Key v. Holloway, 7 Baxt. 576; Frear v. Williams, 7 Baxt. 550; Smith v. Smith, 4 Baxt. 293.

[3] Werstler v. Custer, 46 Pa. 502.

[4] Titlow v. Titlow, 54 Pa. 216, 93 Am. Dec. 691.

[5] Perkins v. Perkins, 39 N. H. 163.

[6] Knox's Appeal, 26 Conn. 20; Comstock v. Hadlyme Eccl. Soc. 8 Conn. 261, 20 Am. Dec. 100; Evans v. Arnold, 52 Ga. 169; Potts v. House, 6 Ga. 324, 50 Am. Dec. 329; Keithley v. Stafford, 126 Ill. 507; Carpenter v. Calvert, 83 Ill. 62; Holloway v. Galloway, 51 Ill. 160; Rigg v. Wilton, 13 Ill. 15, 54 Am. Dec. 419; Hawkins v. Grimes, 13 B. Mon. 257; Cramer v. Crumbaugh, 3 Md. 491; Barker v. Comins, 110 Mass. 477; Crowninshield v. Crowninshield, 2 Gray, 524; Phelps v. Hartwell, 1 Mass. 71; Hall v. Perry, 87 Me. 569; Robinson v. Adams, 62 Me. 369; Gerrish v. Nason, 22 Me. 438, 39 Am. Dec. 589; Cilley v. Cilley, 34 Me. 162; Barnes v. Barnes, 66 Me. 286; O'Connor v. Madison, 98 Mich. 183; Prentis v. Bates, 93 Mich. 234, 17 L. R. A. 494; Aikin v. Weckerley, 19 Mich. 482; Sheehan v. Kearney (Miss.) 21 So. 41, 35 L. R. A. 102; Tucker v. Whitehead, 59 Miss. 594; Carl v. Gabel, 120 Mo. 283; Cravens v. Faulconer, 28 Mo. 21; Norton v. Paxton, 110 Mo. 456; Benoist v. Murrin, 58 Mo. 307; Tingley v. Cowgill, 48 Mo. 291; Jones v. Roberts, 37 Mo. App. 163; Elliott v. Welby, 13 Mo. App. 19; Murry v. Hennessey, 48 Neb. 608; Seebrock v. Fedawa, 30 Neb. 424; Hardy v. Mer-

they are entitled to open and conclude the argument before the jury.[1] So, the presumption of sanity does not apply in a will contest where the statute requires the testator to be of sound mind to make a valid will, such soundness of mind being required to be proved by the proponent.[2] And the burden is the same where the statute provides for proof of the execution of the will and sanity of the testator by the proponent.[3] And the averment on the part of the proponents for the purpose of forming an issue should include everything necessary to constitute a valid will, though where the requirement of soundness rests upon implication only the presumption of sanity would be sufficient to satisfy the implication without averment.[4] The burden of proof resting with the proponent continues throughout the trial, and does not shift upon evidence of sanity.[5] But where a prima

rill, 56 N. H. 227, 22 Am. Rep. 441; Mountain v. Bennett, 1 Cox, Eq. 356; Den v. Van Cleve, 5 N. J. L. 589; Delafield v. Parish, 25 N. Y. 9; Re Flansburgh's Will, 82 Hun, 49; Kingsley v. Blanchard, 56 Barb. 317; Re Forman's Will, 54 Barb. 274; Jones v. Jones, 43 N. Y. S. R. 434; Chrisman v. Chrisman, 16 Or. 127; Vance v. Upson, 66 Tex. 476; Beazley v. Denson, 40 Tex. 416; Renn v. Samos, 33 Tex. 760; Williams v. Robinson, 42 Vt. 658, 1 Am. Rep. 359; Denny v. Pinney, 60 Vt. 524; Ridell v. Johnson, 26 Gratt. 152; Re Silverthorn's Will, 68 Wis. 372; McMechen v. McMechen, 17 W. Va. 683, 41 Am. Rep. 682; Banks v. Goodfellow, 22 L. T. N. S. 813; Smee v. Smee, L. R. 5 Prob. Div. 84; Sutton v. Sadler, 3 C. B. N. S. 87; Browning v. Budd, 6 Moore, P. C. 430; Wallis v. Hodgeson, 2 Atk. 56; Harris v. Ingledew, 3 P. Wms. 91; Barry v. Butlin, 1 Curt. Eccl. Rep. 637. And see Re Layman's Will, 40 Minn. 371.

[1] Comstock v. Hadlyme Eccl. Soc. 8 Conn. 261, 20 Am. Dec. 100; Rigg v. Wilton, 13 Ill. 15, 54 Am. Dec. 419; Brooks v. Barrett, 7 Pick. 94; Phelps v. Hartwell, 1 Mass. 71; Robinson v. Adams, 62 Me. 369, 16 Am. Rep. 473.

[2] Robinson v. Adams, 62 Me. 369, 16 Am. Rep. 473; Barnes v. Barnes, 66 Me. 286; Cilley v. Cilley, 34 Me. 162; Gerrish v. Nason, 22 Me. 438, 39 Am. Dec. 589; Crowninshield v. Crowninshield, 2 Gray, 524; Beaubien v. Cicotte, 8 Mich. 9; Martin v. Perkins, 56 Miss. 204; Nicholas v. Kershner, 20 W. Va. 251; McMechen v. McMechen, 17 W. Va. 683, 41 Am. Rep. 682.

[3] Re Layman's Will, 40 Minn. 371.

[4] Beaubien v. Cicotte, 8 Mich. 9. And see Hawkins v. Grimes, 13 B. Mon. 257.

[5] Crowninshield v. Crowninshield, 2 Gray, 524; Barker v. Comins, 110 Mass. 477; Norton v. Paxton, 110 Mo. 456; Baxter v. Abbott, 7 Gray, 71; Sheehan v. Kearney (Miss.) 21 So. 41, 35 L. R. A. 102; Elliott v. Welby, 13 Mo. App. 19; Prentis v. Bates, 93 Mich. 234, 17 L. R. A. 494; Aikin v.

facie case has been established by the proponents the case stands the same as if the burden of proof throughout rested with the contestants, and they are bound by rules applicable to the party having the affirmative as to the order of their proof.[1] The rule in Illinois, and perhaps some of the other states, however, is that while the burden rests with the proponent to show that the testator was of sound mind, when this is done the burden shifts to the contestant, not only to neutralize the proof of sanity, but also the presumption of sanity.[2] So, the burden of proof resting with the proponent is usually regarded as requiring the production of some evidence to support it other than the presumption of soundness of mind.[3] Sufficient proof to make out a prima facie case of sanity is necessary to the admission of a will to probate as one of the jurisdictional facts.[4] But the contrary rule that mere proof of execution is sufficient has been held.[5] And proof of sanity is not indispensable in the absence of evidence of unsoundness, as in such case the disposition made by the will may of itself afford sufficient evidence of sanity.[6] And a prima facie case which will satisfy the

Weckerly, 19 Mich. 482; Delafield v. Parish, 25 N. Y. 9; Chrisman v. Chrisman, 16 Or. 127; Livingston's Appeal, 63 Conn. 68; Sutton v. Sadler, 3 C. B. N. S. 87. But see Illinois cases cited below.

[1] Kempsey v. McGinniss, 21 Mich. 123; Re Layman's Will, 40 Minn. 371; Jones v. Jones, 43 N. Y. S. R. 434; Sutton v. Sadler, 3 C. B. N. S. 87; Re Silverthorn's Will, 68 Wis. 372. And see Harrison v. Rowan, 3 Wash. C. C. 580; Hodgdon v. Crosby, 1 Wash. Terr. 578; Carpenter v. Carpenter, Milw. 159; Taylor v. Creswell, 45 Md. 422; Tyson v. Tyson, 37 Md. 567; Higgins v. Carlton, 28 Md. 115, 92 Am. Dec. 666; Cramer v. Crumbaugh, 3 Md. 491; Hoge v. Fisher, 1 Pet. C. C. 163; Barber's Appeal, 63 Conn. 393, 22 L. R. A. 90; Jackson v. Hardin, 83 Mo. 175.

[2] Carpenter v. Calvert, 83 Ill. 62; Wilbur v. Wilbur, 129 Ill. 392; Pendlay v. Eaton, 130 Ill. 69; Holloway v. Galloway, 51 Ill. 160. See also Jackson v. Hardin, 83 Mo. 175; Re Barber's Appeal, 63 Conn. 393, 22 L. R. A. 90; Groom v. Thomas, 2 Hagg. Eccl. Rep. 433; Den, Stevens, v. Vancleve, 4 Wash. C. C. 262; Higgins v. Carlton, 28 Md. 115, 92 Am. Dec. 666.

[3] Aikin v. Weckerly, 19 Mich. 482; McGinnis v. Kempsey, 27 Mich. 363; Martin v. Perkins, 56 Miss. 204; Re Silverthorn's Will, 68 Wis. 372. And see Higgins v. Carlton, 28 Md. 115, 92 Am. Dec. 666; Hubbard v. Hubbard, 7 Or. 42.

[4] Re Baldwin's Estate, 13 Wash. 666; Re Silverthorn's Will, 62 Wis. 372.

[5] Gass v. Gass, 3 Humph. 278; Frear v. Williams, 7 Baxt. 550; Ford v. Ford, 7 Humph. 92.

[6] Anderson v. Irwin, 101 Ill. 411; Holloway v. Galloway, 51 Ill. 159.

burden of proof is made out by proof of due execution of a will rational in its provisions and consistent in its details, language, and construction,[1] and the testimony of the subscribing witnesses as to capacity is sufficient.[2] The burden of proof in a will contest rests with the proponent to show general sanity or testamentary capacity only, however, and a charge submitting to the jury the question whether the testatrix was entirely free from insanity of any kind is improper.[3]

So, the same conflict exists on the question of the burden of proof in a proceeding to set aside a will already probated. Thus the rule is laid down by some of the cases that one who seeks to set aside a will which has been established in probate court, upon an allegation of mental incapacity, assumes the affirmative and has the burden of proof;[4] and he has the right to open and close upon the trial.[5] And the effect of a statute providing that the order of probate shall be prima facie evidence of the due attestation, execution, and validity of the will is to change the burden of proof in respect to each of these subjects from the propounders to the contestants where it remains, leaving the weight of the evidence the only question for determination.[6] But, on the other hand, it is held that the burden of proof in a proceeding to contest a will after its admission to probate rests with those seeking to maintain it to show that at the time of its execution the testator was of sound mind and memory.[7] And the propounder is

[1] Fee v. Taylor, 83 Ky. 259; Milton v. Hunter, 13 Bush, 163; Flood v. Pragoff, 79 Ky. 607; Symes v. Green, 1 Swab. & T. 401, 5 Jur. N. S. 742. And see Cole's Will, 49 Wis. 179.

[2] O'Connor v. Madison, 98 Mich. 183; Taft v. Hosmer, 14 Mich. 309.

[3] Wetter v. Habersham, 60 Ga. 194.

[4] Jenkins v. Tobin, 31 Ark. 306; Moore v. Allen, 5 Ind. 521; Blough v Parry, 144 Ind. 463; Rich v. Bowker, 25 Kan. 7; Copeland v. Copeland, 32 Ala. 512; Chrisman v. Chrisman, 16 Or. 127.

[5] Moore v. Allen, 5 Ind. 521.

[6] Mears v. Mears, 15 Ohio St. 90.

[7] Trish v. Newell, 62 Ill. 196; Comstock v. Hadlyme Eccl. Soc. 8 Conn. 254, 20 Am. Dec. 100; Livingston's Appeal, 63 Conn. 68; Potts v. House, 6 Ga. 324, 50 Am. Dec. 329; Jackson v. Hardin, 83 Mo. 175; Benoist v. Murrin, 58 Mo. 307; Tingley v. Cowgill, 48 Mo. 291; Cravens v. Faulconer, 28 Mo. 21; Jones v. Roberts, 37 Mo. App. 163; Elliott v. Welby, 13 Mo. App. 19.

entitled to open and close.[1] And an instruction that the plaintiff in such a proceeding must prove that the testator was not of sound mind and sufficient disposing memory to bequeath his property is error, where the statute only requires the contestant to show that the testator was of sound mind.[2] So, the burden of proving the proper execution of a will rests with the defendant in ejectment claiming under it, and for that purpose he must call the subscribing witnesses, making them his own, to testify as to the fact of execution and mental capacity, leaving the plaintiff the benefit of cross-examining them.[3] After the defendant has put the will in evidence, and made proof of testamentary capacity by the subscribing witnesses, and the will has been admitted to probate, however, the burden of proof no longer rests with him, and it is then the duty of the jury to determine the question of testamentary capacity from the weight of all the evidence introduced.[4] The onus rests with a party procuring the execution of a will to prove capacity when incapacity is alleged.[5]

II. Measure of proof.

§ 1. *Conflicting character of the criminal cases.*

The cases in the different states and jurisdictions with relation to the measure or quantity of proof necessary to establish insanity as a defense in a criminal prosecution are hopelessly conflicting; they may be said, however, to have arranged themselves in several groups each of which has adopted a rule of its own which has been stated and acted upon with a reasonable degree of certainty.

§ 2. *Beyond a reasonable doubt.*

The rule was laid down and acted upon in some of the earlier cases that proof of insanity at the time of the commission of the

[1] Potts v. House, 6 Ga. 324; Comstock v. Hadlyme Eccl. Soc. 8 Conn. 254, 20 Am. Dec. 100.

[2] Kenworthy v. Williams. 5 Ind. 375.

[3] Waters v. Waters, 35 Md. 531.

[4] Pendlay v. Eaton, 130 Ill. 69; Holloway v. Galloway, 51 Ill. 159; Runyan v. Price, 15 Ohio St. 1, 86 Am. Dec. 459; Newhard v. Yundt, 132 Pa. 324; Re Cole's Will, 49 Wis. 179.

[5] Currie v. Currie, 24 Can. S. C. 712. And see Hegney v. Head, 126 Mo. 619.

crime, to warrant an acquittal on that ground, ought to be as clear and satisfactory as proof of committing the act ought to be in order to find a sane man guilty.' And that when relied upon as a defense it should be made out to the satisfaction of the jury beyond a reasonable doubt.[2] But this doctrine has been overruled and repudiated except in a few instances. The rule that one who alleges insanity as an excuse for crime must establish it beyond a reasonable doubt, however, has been retained in Louisiana, at least until a very recent date.[3] And in Oregon the defense of insanity in a criminal prosecution is required to be established beyond a reasonable doubt by statute,[4] under which the finding of the jury on the question of insanity is conclusive, and cannot be disturbed on appeal.[5]

§ 3. *Preponderance of proof.*

One of the leading doctrines on this subject which is supported by a large number of well-considered cases, and which has been adopted by a number of the states, is that which regards the plea of insanity as a separate and independent defense.[6] Within this doctrine insanity need not be established beyond a reasonable doubt.[7] And a mere doubt of sanity is not sufficient to warrant

[1] State v. Spencer, 21 N. J. L. 196.

[2] State v. Brinyea, 5 Ala. 241; State v. Newman, 7 Ala. 69; State v. Marler, 2 Ala. 43, 36 Am. Dec. 398; State v. West, 1 Houst. Crim. Rep. 371; People v. McCann, 3 Park. Crim. Rep. 272; Sellick's Case, 1 City Hall Rec. 185; State v. Murray, 11 Or. 413; State v. DeRancé, 34 La. Ann. 186; 44 Am. Rep. 426; State v. Clements, 47 La. Ann. 1088; Bellingham's Case, 1 Collinson on Lunacy, 636; Rex v. Offord, 5 Car. & P. 168. And see Cunningham v. State, 56 Miss. 272, 31 Am. Rep. 360.

[3] State v. Clements, 47 La. Ann. 1088; State v. DeRancé, 34 La. Ann. 186, 44 Am. Rep. 426; State v. Coleman, 27 La. Ann. 691. But see State v. Scott, 49 La Ann. 253, 36 L. R. A. 721.

[4] Hill's Code (Or.) § 1358.

[5] State v. Hansen, 25 Or. 391.

[6] Com. v. Bezek, 168 Pa. 603; State v. Gut, 13 Minn. 543; State v. Lewis, 20 Nev. 333.

[7] State v. Wright, 134 Mo. 404; State v. Duestrow (Mo.) 38 S. W. 554; State v. Klinger, 43 Mo. 127; State v. Johnson, 91 Mo. 439; State v. Hundley, 46 Mo. 414; State v. Spencer, 21 N. J. L. 196; State v. Potts, 100 N. C. 457; Loeffner v. State, 10 Ohio St. 598; Com. v. Werling, 164 Pa. 559; Pannell v. Com. 86 Pa. 260; Meyers v. Com. 83 Pa. 141; Boswell v. Com. 20 Gratt. 860; State v. Robinson, 20 W. Va. 713, 43 Am. Rep. 799.

an acquittal;[1] the measure of proof required to establish insanity being variously stated as a fair preponderance of the evidence,[2] or such as reasonably satisfies the jury,[3] or a clear preponderance of

[1] Lynch v. Com. 77 Pa. 205; Ortwein v. Com. 76 Pa. 414, 18 Am. Rep. 420.

[2] Gunter v. State, 80 Ala. 96; Ford v. State, 71 Ala. 385; Boswell v. State, 63 Ala. 307, 35 Am. Rep. 20; Parsons v. State, 81 Ala. 577, 60 Am. Rep. 193; Maxwell v. State, 89 Ala. 150; Boswell v. State, 63 Ala. 326; Williams v. State, 50 Ark. 517; Coates v. State, 50 Ark. 330; Casat v. State, 40 Ark. 511; McKenzie v. State, 26 Ark. 334; People v. Bawden, 90 Cal. 195; People v. Bemmerly, 98 Cal. 299; People v. Ward, 105 Cal. 335; People v. Messersmith, 57 Cal. 575; People v. Coffman, 24 Cal. 233; People v. McDonell, 47 Cal. 134; People v. Myers, 20 Cal. 518; People v. Wilson, 49 Cal. 13; People v. Bell, 49 Cal. 485; People v. Wreden, 59 Cal. 392, 12 Rep. 682; People v. McNulty, 93 Cal. 427; People v. Travers, 88 Cal. 233; State v. Hoyt, 46 Conn. 330, 47 Conn. 518; Carr v. State, 96 Ga. 284; Carter v. State, 56 Ga. 463; Danforth v. State, 75 Ga. 614; State v. Trout, 74 Iowa, 545; State v. Geddis, 42 Iowa, 268; State v. Bruce, 48 Iowa, 530, 30 Am. Rep. 403; State v. Felter, 32 Iowa, 53; State v. Jones, 64 Iowa, 356; Ball v. Com. (Ky.) 18 Cent. L. J. 438, 16 Chic. Leg. N. 299; Phelps v. Com. 17 Ky. L. Rep. 706; Moore v. Com. 92 Ky. 630; Kriel v. Com. 5 Bush, 363; State v. Lawrence, 57 Me. 574; Com. v. Rogers, 7 Met. 500, 41 Am. Dec. 458; Com. v. Eddy, 7 Gray, 583; People v. Garbutt, 17 Mich. 9, 97 Am. Dec. 162; State v. Williamson, 106 Mo. 162; State v. McCoy, 34 Mo. 531, 86 Am. Dec. 121; State v. Hundley, 46 Mo. 414; State v. Klinger, 43 Mo. 127; State v. Lewis, 20 Nev. 333; State v. Martin (N. J.) 3 Crim. L. Mag. 44; Graves v. State, 45 N. J. L. 347, 46 Am. Rep. 778; State v. O'Grady, 3 Ohio Leg. News, 137; Farrer v. State, 2 Ohio St. 54; Silvus v. State, 22 Ohio St. 90; Bond v. State, 23 Ohio St. 349; Loeffner v. State, 10 Ohio St. 599; Cottell v. State, 12 Ohio C. C. 467; Com. v. Bezek, 168 Pa. 603; Com. v. Woodley, 166 Pa. 463; Com. v. Werling, 164 Pa. 559; Coyle v. Com. 100 Pa. 573, 45 Am. Rep. 397; Sayres v. Com. 88 Pa. 291; Pannell v. Com. 86 Pa. 260; Meyers v. Com. 83 Pa. 141; Brown v. Com. 78 Pa. 122; State v. McIntosh, 39 S. C. 97; State v. Bundy, 24 S. C. 439, 58 Am. Rep. 263; State v. Paulk, 18 S. C. 514; State v. Alexander, 30 S. C. 74; Hoard v. State, 15 Lea, 318; Lovegrove v. State, 31 Tex. Crim. Rep. 491; Newberry v. State, 32 Tex. Crim. Rep. 145; Boren v. State, 32 Tex. Crim. Rep. 637; Smith v. State, 19 Tex. App. 95; Leache v. State, 22 Tex. App. 279, 58 Am. Rep. 638; People v. Dillon, 8 Utah, 92.

[3] People v. McDonell, 47 Cal. 134; People v. Coffman, 24 Cal. 230; State v. Harrigan, 9 Houst. (Del.) 369; State v. Pratt, 1 Houst. Crim. Rep. 249; State v. Danby, 1 Houst. Crim. Rep. 166; People v. Walters, 1 Idaho, 386; State v. Hockett, 70 Iowa, 442; State v. Bruce, 48 Iowa, 530, 30 Am. Rep. 403; State v. Geddis, 42 Iowa, 268; Graham v. Com. 16 B. Mon. 587; Kriel v. Com. 5 Bush, 362; Moore v. Com. 92 Ky. 630; Kaelin v. Com. 84

proof,[1] or such as rationally convinces the jury,[2] or that it must be established to a reasonable certainty,[3] or that it must be made plainly to appear,[4] or that it must be clearly proved or established.[5] These different methods of stating the rule would seem to have been used interchangeably and as meaning practically the same thing, except, perhaps, with reference to the one requiring insanity to be clearly established. Thus, it has been held that

Ky. 354; State v. Scott, 49 La. Ann. 253, 36 L. R. A. 721; Com. v. Rogers, 7 Met. 500, 41 Am. Dec. 458; Com. v. Heath, 11 Gray, 303; State v. Hanley, 34 Minn. 430; State v. Gut, 13 Minn. 343; State v. Duestrow (Mo.) 38 S. W. 554; State v. Wright, 134 Mo. 404; State v. Schaefer, 116 Mo. 96; State v. Redemeier, 71 Mo. 173, 36 Am. Rep. 462; State v. Pagels, 92 Mo. 300; State v. Smith, 53 Mo. 267; State v. Hundley, 46 Mo. 414; State v. Huting, 21 Mo. 464; Baldwin v. State, 12 Mo. 227; People v. Pine, 2 Barb. 566; State v. Bartlett, 43 N. H. 224, 80 Am. Rep. 154; State v. Davis, 109 N. C. 780, 14 L. R. A. 206; State v. Payne, 86 N. C. 609; State v. Potts, 100 N. C. 457; State v. Vann, 82 N. C. 631; State v. Starling, 6 Jones, L. 366; Loeffner v. State, 10 Ohio St. 598; Bond v. State, 23 Ohio St. 349; Com. v. Bezek, 168 Pa. 603; Sayres v. Com. 88 Pa. 291; Lynch v. Com. 77 Pa. 205; Ortwein v. Com. 76 Pa. 414, 18 Am. Rep. 420; Com. v. Sayres, 12 Phila. 553; Com. v. Lynch, 3 Pittsb. 412; State v. Stark, 1 Strobh. L. 479; Leache v. State, 22 Tex. App. 279, 58 Am. Rep. 638; Massengale v. State, 24 Tex. App. 181; Johnson v. State, 10 Tex. App. 571; King v. State, 9 Tex. App. 558; Webb v. State, 9 Tex. App. 490; Smith v. State, 22 Tex. 316; Clarke v. State, 8 Tex. App. 350; Dejarnette v. Com. 75 Va. 867; Baccigalupo v. Com. 33 Gratt. 807, 36 Am. Rep. 795; Boswell v. Com. 20 Gratt. 860; State v. Douglass, 28 W. Va. 297; State v. Robinson, 20 W. Va. 713, 43 Am. Rep. 799; State v. Strauder, 11 W. Va. 745, 27 Am. Rep. 606; United States v. McGlue, 1 Curt. C. C. 1; Reg. v. Layton, 4 Cox, C. C. 149; Reg. v. Stokes, 3 Car. & K. 185; Reg. v. Townley, 3 Fost. & F. 839; Hadfield's Case, 27 How. St. Tr. 1281; Reg. v. Higginson, 1 Car. & K. 129.

[1] State v. Martin (N. J.) 3 Crim. L. Mag. 44.

[2] Kriel v. Com. 5 Bush, 366; Parker's Case, 1 Collinson on Lunacy, 477.

[3] Humphreys v. State, 45 Ga. 190; Beck v. State, 76 Ga. 452; Holsenbake v. State, 45 Ga. 43. And see Bellingham's Case, 1 Collinson on Lunacy, 636.

[4] Sanders v. State, 18 Tex. App. 372.

[5] People v. McDonell, 47 Cal. 134; Com. v. Farkin, 3 Pa. L. J. 480; State v. Spencer, 21 N. J. L. 196; Com. v. McCauley, 16 Phila. 502; State v. Martin (N. J.) 3 Crim. L. Mag. 44; Clark v. State, 8 Tex. App. 350; Webb v. State, 5 Tex. App. 596; Smith v. State, 31 Tex. Crim. Rep. 14; Smith v. State, 19 Tex. App. 95; King v. State, 9 Tex. App. 558; M'Naghten's Case, 10 Clark & F. 200; Kleim's Case, Ray's Med. Jur. (5th ed.) § 42.

insanity may be established by proof which is satisfactory to the jury, such as falls fairly from a preponderance of the evidence,[1] or by such as preponderates and reasonably satisfies the jury,[2] or by satisfactory or at least preponderating evidence.[3] And an instruction that insanity must be shown by the weight and preponderance of the testimony is a mere informality and not a ground for reversal, though the jurors might be led to believe that it required something more than a mere conviction of the mind.[4] And an instruction that insanity must be established by a preponderance of evidence to the satisfaction of the jury is not reversible error, as there might be a preponderance and still a failure to satisfy them.[5] But an instruction that insanity must be clearly proved is objectionable as imposing too great a burden upon the accused, as it need only be proved by fairly preponderating evidence.[6] And one requiring clear preponderating evidence, instead of fairly preponderating evidence, is erroneous,[7] as tending to lead the jury to believe that something more than a preponderance, or what would reasonably satisfy them, was necessary.[8] And error in instructing that insanity must be clearly proved is not remedied by a subsequent instruction that it must be proved by a preponderance of the evidence, as it cannot be known which of the two measures the jury adopted.[9] An instruction that insanity must be clearly proved, however, has been held proper, as a preponderance of the evidence is sufficient to constitute clear proof,[10] and not objectionable as a charge upon the degree or measure, and not upon the weight of evidence,[11] or

[1] Meyers v. Com. 83 Pa. 141.
[2] State v. Williamson, 106 Mo. 162; State v. Lewis, 20 Nev. 333.
[3] Brown v. Com. 78 Pa. 122.
[4] State v. Smith, 53 Mo. 267.
[5] State v. Payne, 86 N. C. 609.
[6] Com. v. Gerade, 145 Pa. 289.
[7] Coyle v. Com. 100 Pa. 573, 45 Am. Rep. 397; State v. Hundley, 46 Mo. 414.
[8] State v. Hundley, 46 Mo. 414.
[9] Com. v. Gerade, 145 Pa. 289.
[10] Smith v. State, 19 Tex. App. 95.
[11] Giebel v. State, 28 Tex. App. 151.

as requiring that evidence must more than predominate, as it only requires that the predominance must be clearly apparent.[1]

The preponderance of evidence required consists of the greater weight of credible evidence in the case,[2] such as can be perceived from a fair consideration of the evidence;[3] the rule requiring the evidence in a criminal prosecution to satisfy the jury beyond a reasonable doubt applying only to the general conclusion of guilty or not guilty upon the whole evidence, and not to a question arising in the case as to the insanity of the accused;[4] and the presumption of sanity having its practical application in imposing the burden of proof upon him who sets up insanity, and not as weighing against any measurable amount of evidence.[5] Insanity is a simple question of fact to be proved like any other fact, by evidence which reasonably satisfies the jury.[6] And it is sufficient if the evidence be such as would justify the jury in a civil case in finding insanity upon the single issue of sane or insane submitted to them.[7] Nor is it necessary that the proof should be direct or positive; it may be shown by such facts and circumstances as convince the mind of its existence the same as any other fact.[8] And as a general rule the whole evidence is to be considered,[9] and the rebutting proof which may be considered may arise either out of the evidence for the prosecution or that of the defense;[10] and a mere doubt of sanity, however rational, is insufficient to

[1] People v. Hamilton, 62 Cal. 377, Overruling People v. Wreden, 59 Cal. 392.

[2] State v. Trout, 74 Iowa, 545; Farrer v. State, 2 Ohio St. 54.

[3] State v. Grear, 29 Minn. 221.

[4] State v. Felter, 32 Iowa, 53; State v. Starling, 6 Jones, L. 366; People v. Ward, 105 Cal. 335.

[5] State v. Jones, 64 Iowa, 356. And see State v. Bartlett, 43 N. H. 224, 80 Am. Dec. 154.

[6] State v. Hundley, 46 Mo. 414; State v. Starling, 6 Jones, L. 366.

[7] People v. Hamilton, 62 Cal. 377; People v. Massersmith, 61 Cal. 246; People v. Wilson, 49 Cal. 13; Com. v. Gerade, 145 Pa. 289.

[8] State v. Hockett, 70 Iowa, 442; State v. Pagels, 92 Mo. 300.

[9] State v. Strauder, 11 W. Va. 745; State v. Scott, 49 La. Ann. 253, 36 L. R. A. 721. And see Com. v. Eddy, 7 Gray, 583; De Jarnette v. Com. 75 Va. 867; United States v. McGlue, 1 Curt. C. C. 1.

[10] Com. v. Rogers, 7 Met. 500, 41 Am. Dec. 458; Com. v. Heath, 11 Gray, 303; Kriel v. Com. 5 Bush, 363; State v. McIntosh, 39 S. C. 97.

rebut the legal presumption of sanity, and cannot justify an acquittal.[1]

Some of the cases, however, which may be deemed to establish the rule, at least in Delaware, Georgia, and South Carolina, while holding to the rule that insanity must be established by a preponderance of the evidence or to the satisfaction of the jury, held that evidence bearing upon the question of insanity should be considered in connection with all other evidence in determining whether or not, upon a view of the whole case, there is reasonable doubt of guilt.[2] And if, upon a consideration of all the evidence, the state's as well as the defendant's, any reasonable doubt of the guilt of the accused remains,[3] or if any reasonable doubt of his accountability remains,[4] which the presumption of sanity and proof on the part of the state has not removed, the accused should be acquitted. But the doubt to be raised in favor of the person must be a serious, well-founded, and satisfactory doubt,[5] and refusal to instruct the jury that if they entertain a reasonable doubt of sanity they should acquit is not error where the court had fully charged with reference to reasonable doubt with regard to the whole case.[6] Nor is failure to charge that

[1] Maxwell v. State, 89 Ala. 150; Gunter v. State, 83 Ala. 96; Parsons v. State, 81 Ala. 577, 60 Am. Rep. 193; Ford v. State, 71 Ala. 385, 5 Crim. L. Mag. 32; People v. Myers, 20 Cal. 518; Kriel v. Com. 5 Bush, 362; State v. Hunting, 21 Mo. 464; State v. Johnson, 91 Mo. 439; Lynch v. Com. 77 Pa. 205; Ortwein v. Com. 76 Pa. 414, 18 Am. Rep. 420; Com. v. Lynch, 3 Pittsb. 412; State v. Douglass, 28 W. Va. 297; State v. Strauder, 11 W. Va. 745.

[2] Carr v. State, 96 Ga. 284.

[3] State v. McIntosh, 39 S. C. 97; Westmorland v. State, 45 Ga. 225; Brown v. Com. 14 Bush, 398; Smith v. Com. 1 Duv. 224; Jane v. Com. 2 Met. (Ky.) 30; State v. Gardiner, Wright (Ohio) 392; State v. Merrick, 19 Me. 398.

[4] State v. Reidell, 9 Houst. (Del.) 470; State v. Thomas, 1 Houst. Crim. Rep. 511; Farrer v. State, 2 Ohio St. 54; State v. Gardiner, Wright (Ohio) 392; State v. Coleman, 20 S. C. 441; Anderson v. State, 42 Ga. 9; Westmorland v. State, 45 Ga. 225. And see Smith v. Com. 1 Duv. 224; Com. v. Winnemore, 1 Brewst. 356; Boswell v. Com. 20 Gratt. 860; State v. Murphy, 33 Iowa, 270, 11 Am. Rep. 122; State v. Thompson, Wright (Ohio) 624.

[5] State v. Coleman, 20 S. C. 441; Smith v. Com. 1 Duv. 224; Kriel v. Com. 5 Bush, 362.

[6] Webb v. State, 9 Tex. App. 490.

insanity must be proved by a preponderance of the evidence, and that the evidence bearing upon the question should be considered in connection with the other evidence in determining whether there was reasonable doubt of guilt, erroneous where the charge given was sufficiently full and fair to give the accused the benefit of all the evidence relating to insanity for the purpose of casting doubt upon his guilt.[1] So, in two early Alabama cases holding that insanity must be proved beyond a reasonable doubt, it was also held that a reasonable doubt of sanity upon the whole evidence would justify an acquittal.[2]

§ 4. *Reasonable doubt of insanity.*

Another of the leading rules as to the measure of proof of insanity, which is at least holding its own if not gaining ground, is the one holding that a criminal act includes the element of a rational agency which must be shown by the state as well as any other element of the crime,[3] sanity being a necessary ingredient of criminal responsibility;[4] and a reasonable doubt as to the sanity of the accused being a reasonable doubt as to his guilt entitling him to an acquittal.[5] Within this rule if there arises from the evidence coming from any quarter a reasonable doubt as to the sanity of the accused the presumption of sanity is overcome, and he is entitled to an acquittal unless the state meets and overcomes the reasonable doubt arising in his favor.[6]

[1] Carr v. State, 96 Ga. 284.

[2] State v. Brinyea, 5 Ala. 241; State v. Marler, 2 Ala. 43, 36 Am. Dec. 398. But see later Alabama cases cited above.

[3] Armstrong v. State, 30 Fla. 170, 17 L. R. A. 484.

[4] Chase v. People, 40 Ill. 352; Hopps v. People, 31 Ill. 385, 83 Am. Dec. 231; People v. Garbutt, 17 Mich. 9, 97 Am. Dec. 162; People v. McCann, 16 N. Y. 58, 69 Am. Dec. 642.

[5] State v. Nixon, 32 Kan. 205; State v. Crawford, 11 Kan. 32; Langdon v. People, 133 Ill. 382; Lilly v. People, 148 Ill. 467; Jamison v. People, 145 Ill. 357.

[6] Armstrong v. State, 30 Fla. 170, 17 L. R. A. 484; Armstrong v. State, 27 Fla. 366; Hodge v. State, 26 Fla. 11; State v. Reidell, 9 Houst. (Del.) 470; Lilly v. People, 148 Ill. 467; Jamison v. People, 145 Ill. 357; Montag v. People, 141 Ill. 75; Langdon v. People, 133 Ill. 382; Dacey v. People, 116 Ill. 555; Hopps v. People, 31 Ill. 385, 83 Am. Dec. 231; Chase v. People, 40 Ill. 352; Plake v. State, 121 Ind. 433; Hiler v. State, 4 Blackf. 552; Polk v. State, 19 Ind. 170, 81 Am. Dec. 382; Guetig v. State, 66 Ind. 94, 32 Am.

And where there is proof of insanity, whether on the part of the government or of the accused, it is incumbent upon the prosecutor to satisfy the jury beyond a reasonable doubt of the existence of all the elements constituting the offense, including the necessary soundness of mind.[1] Sanity being the normal condition the prosecution need not introduce evidence to prove it in the first instance until the presumption of its existence is attacked, but when the jury comes to consider the whole case they must do so upon the basis that as to each and every portion of it they should be satisfied beyond a reasonable doubt before they can convict.[2] To

Rep. 99; Stevens v. State, 31 Ind. 485, 99 Am. Dec. 634; Bradley v. State, 31 Ind. 492; State v. Nixon, 32 Kan. 205; State v. Crawford, 11 Kan. 32; People v. Finley, 38 Mich. 482; People v. Garbutt, 17 Mich. 22, 97 Am. Dec. 162; Cunningham v. State, 56 Miss. 269, 31 Am. Rep. 360; Ford v. State, 73 Miss. 734, 35 L. R. A. 117; Russell v. State, 53 Miss. 367; Smith v. State, 4 Neb. 277; State v. Waterman, 1 Nev. 543; Wright v. People, 4 Neb. 407; Faulkner v. Territory, 6 N. M. 464; Brotherton v. People, 75 N. Y. 159; People v. McCann, 16 N. Y. 58, 69 Am. Dec. 642; Moett v. People, 85 N. Y. 373; Wagner v. People, 2 Keyes, 684; O'Connell v. People, 87 N. Y. 377, 41 Am. Rep. 379, Affirming 62 How. Pr. 436; Walker v. People, 26 Hun, 67, 1 N. Y. Crim. Rep. 7, Affirmed 88 N. Y. 81; People v. Casey, 2 N. Y. Crim. Rep. 187, Reversed on other grounds, 2 N. Y. Crim. Rep. 194; People v. Coleman, 1 N. Y. Crim. Rep. 1; State v. Coleman, 20 S. C. 441; State v. McIntosh, 39 S. C. 97; King v. State, 91 Tenn. 617; Coffee v. State, 3 Yerg. 283, 24 Am. Dec. 570; Dove v. State, 3 Heisk. 348; Lawless v. State, 4 Lea, 179; Revoir v. State, 82 Wis. 295; State v. Patterson, 45 Vt. 308, 12 Am. Rep. 200; Davis v. United States, 160 U. S. 469, 40 L. ed. 499; Guiteau's Case, 10 Fed. Rep. 161; United States v. Faulkner, 35 Fed. Rep. 730; Chaffee v. United States, 85 U. S. 18 Wall. 517, 21 L. ed. 908; United States v. Lancaster, 7 Biss. 440; Lay's Case, 1 Lewin, C. C. 239. And see Lilly v. People, 148 Ill. 467; Ogletree v. State, 28 Ala. 693; Stuart v. State, 1 Baxt. 178.

[1] State v. Johnson, 40 Conn. 136; Hite v. Sims, 94 Ind. 333; Stevens v. State, 31 Ind. 485, 99 Am. Dec. 634; State v. Reddick, 7 Kan. 143; Com. v. McKie, 1 Gray, 61, 61 Am. Dec. 410; Cunningham v. State, 56 Miss. 269, 31 Am. Rep. 360; Ford v. State, 73 Miss. 734, 35 L. R. A. 117; Furst v. State, 31 Neb. 403; State v. Bartlett, 43 N. H. 224, 80 Am. Dec. 154; Moett v. People, 85 N. Y. 373; Walker v. People, 26 Hun, 67, 1 N. Y. Crim. Rep. 7, Affirmed 88 N. Y. 81; Com. v. Gerade, 145 Pa. 289; Davis v. United States, 160 U. S. 469, 40 L. ed. 499. And see Com. v. Heath, 11 Gray, 303.

[2] People v. Garbutt, 17 Mich. 9, 97 Am. Dec. 162; Guetig v. State, 66 Ind. 94, 32 Am. Rep. 99; State v. Crawford, 11 Kan. 32; Walker v. People, 26 Hun, 67, 1 N. Y. Crim. Rep. 7, Affirmed 88 N. Y. 81; Moett v. People,

overcome the presumption of sanity evidence must be produced sufficient at least to raise a reasonable doubt of sanity.[1] But when this is done the accused is entitled to an acquittal where the whole evidence, including that supplied by the presumption of sanity and any other presumption in the case, does not exclude beyond a reasonable doubt the hypothesis of insanity,[2] without reference to the question whether the evidence was adduced by the prosecution or by the defendant;[3] the fact that there may have been evidence which, taken by itself, was sufficient to raise a reasonable doubt as to sanity, not justifying an acquittal, as there may have been evidence tending to rebut the defense of insanity, the reasonable doubt upon which the jury should act being one raised from a consideration of all the evidence in the case.[4] And the accused is entitled to an acquittal if the jury entertain a reasonable doubt as to his soundness of mind at the time of the criminal act, though they believe he had judgment and reason sufficient to determine between right and wrong with respect to the ordinary affairs of life;[5] but they should convict if they believe beyond a reasonable doubt that he knew right from wrong and was capable of choosing either to do or not to do the act, though they believe that he was not entirely and perfectly sane.[6]

The reasonable doubt which will justify an acquittal must be a rational, well-founded one,[7] and should include all of the constitu-

85 N. Y. 373; O'Brien v. People, 48 Barb. 274; Walter v. People, 32 N. Y. 147; Montag v. People, 141 Ill. 75; Cunningham v. State, 56 Miss. 269, 31 Am. Rep. 360.

[1] Jamison v. People, 145 Ill. 357; Guetig v. State, 66 Ind. 94, 32 Am. Rep. 99; State v. Mahn, 25 Kan. 182; Faulkner v. Territory, 6 N. M. 464; United States v. Faulkner, 35 Fed. Rep. 730. And see Brotherton v. People, 75 N. Y. 159.

[2] Davis v. United States, 160 U. S. 469, 40 L. ed. 499; Guiteau's Case, 10 Fed. Rep. 161; State v. Crawford, 11 Kan. 32; Brotherton v. People, 75 N. Y. 159; Cunningham v. State, 56 Miss. 269, 31 Am. Rep. 360.

[3] Hodge v. State, 26 Fla. 11.

[4] Jamison v. People, 145 Ill. 357. And see Guetig v. State, 66 Ind. 94, 32 Am. Rep. 99.

[5] Stevens v. State, 31 Ind. 485, 99 Am. Dec. 634.

[6] Hornish v. People, 142 Ill. 620, 18 L. R. A. 237.

[7] Chase v. People, 40 Ill. 352; Hodge v. State, 26 Fla. 11; State v. Coleman, 20 S. C. 441.

tinent elements of legal responsibility.[1] There should be clear, satisfactory evidence of insanity, and the defense should not be sustained on vague and shadowy or fanciful grounds or mere conjecture.[2] But the evidence of insanity need not preponderate,[3] nor establish it beyond a reasonable doubt.[4] Thus, evidence that the defendant was in trouble with his family and disturbed in mind and somewhat excited is not sufficient to raise a reasonable doubt which would require the prosecution to establish his sanity.[5] Nor is evidence that the conduct of the accused was at times peculiar, and that he was nervous and became greatly excited when talking of the subject-matter of his crime, where it appears that he pursued his daily avocations and was treated by others as sane, and that he was actuated by malice.[6] Insanity need not be submitted to the jury as a separate issue, however; it is sufficient if they are required to be satisfied beyond a reasonable doubt of the defendant's guilt.[7] And an instruction that insanity must be clearly proved is not incorrect where the jury is also told that the person must be given the benefit of any doubt as to his sanity arising from the evidence.[8] And one authorizing conviction only if the jury believed beyond a reasonable doubt that the deed was done with malice aforethought is not objectionable as requiring the jury to find a verdict regardless of the defendant's mental condition.[9] And one requiring the jury to carefully consider the evidence for the reason that an insane person ought not to be punished is a charge as to the duty of careful scrutiny, and not as to the degree of evidence, which would be

[1] Smith v. Com. 1 Duv. 224.

[2] Armstrong v. State, 27 Fla. 366; Walker v. People, 88 N. Y. 81; Hodge v. State, 26 Fla. 11; Fisher v. People, 23 Ill. 283. And see Brown v. Com. 14 Bush, 398; State v. Hansen, 25 Or. 411.

[3] Polk v. State, 19 Ind. 170, 81 Am. Dec. 382; Guetig v. State, 66 Ind. 94, 32 Am. Rep. 99; Dacey v. People, 116 Ill. 555.

[4] Armstrong v. State, 27 Fla. 366.

[5] Montag v. People, 141 Ill. 75.

[6] Lilly v. People, 148 Ill. 467.

[7] Hornish v. People, 142 Ill. 620, 18 L. R. A. 237; O'Connell v. People, 87 N. H. 377, 41 Am. Rep. 379.

[8] Walker v. People, 88 N. Y. 86, Affirming 26 Hun, 67, 1 N. Y. Crim. Rep. 7. And see O'Connell v. People, 87 N. Y. 377, 41 Am. Rep. 379.

[9] Upstone v. People, 109 Ill. 169.

objectionable on the ground that the question was not whether the accused was insane, but whether the jury entertain a reasonable doubt as to his sanity.[1]

§ 5. *Measure of proof in civil cases.*

The general rule would seem to be that insanity, like all other facts in a civil case, may be established by a mere preponderance of the evidence. Thus, evidence of insanity to overcome the presumption that all acts performed by an adult are valid and binding must be clear and satisfactory.[2] But no particular quantity of evidence is necessary to sustain the validity of an act on the question of mental capacity; the jury should determine the facts upon the weight of evidence as on any other question.[3] The question where sanity is impeached and the evidence is conflicting is not whether the facts adduced in support of sanity are, in general, indications of sanity, but whether they are inconsistent with or sufficiently explanatory of the indication of insanity produced by the other side,[4] the proof being required to be sufficient to overcome the presumption of sanity.[5]

With reference to wills, where the rule that the burden of proof of insanity rests with him who alleges it is in vogue it is usually held to be incumbent upon the contestant to prove incapacity to the satisfaction of the court or jury before they would be justified in setting aside a will.[6] And it has been held that it must be established by a preponderance of the evidence.[7] And in a doubtful case, unless there is a preponderance of proof of

[1] Goodwin v. State, 96 Ind. 550.

[2] McCarty v. Kearnan, 86 Ill. 291; English v. Porter, 109 Ill. 285; Titcomb v. Vantyle, 84 Ill. 371; Myatt v. Walker, 44 Ill. 487; Kennedy v. Marrast, 46 Ala. 161; Howe v. Howe, 99 Mass. 88; State v. Geddis, 42 Iowa, 268; Com., Helmbold, v. Kirkbride, 11 Phila. 427; Gibbons v. Dunn, 46 Mich. 146; Dorchester v. Dorchester, 3 N. Y. Supp. 238, Reversed on other grounds 121 N. Y. 156.

[3] Rigg v. Wilton, 13 Ill. 15, 54 Am. Dec. 419.

[4] Steed v. Callay, Keen, 620.

[5] Sloan v. Maxwell, 3 N. J. Eq. 563.

[6] Jamison v. Jamison, 3 Houst. (Del.) 108; Mullins v. Cottrell, 41 Miss. 231; Philadelphia Trust & S. D. Co. v. Drinkhouse, 17 Phila. 23; Gass v. Gass, 3 Humph. 278.

[7] Clements v. McGinn (Cal.) 33 Pac. 920; Newhard v. Yundt, 132 Pa. 324.

mental unsoundness, the issue should be found in favor of sanity.[1] And the previous probate of a will raises no presumption that the testator was of sound and disposing mind which the contestant is bound to overcome by a preponderance of evidence.[2] So, where incompetency and undue influence are the issue, positive proof must be made in support of each proposition.[3] And where, upon the whole evidence, the fact of capacity or incapacity remains doubtful, the will cannot be rejected on that ground,[4] the presumption of sanity taking effect in such case in its favor.[5] Upon the other hand, cases holding that the burden of proof of sanity in a will contest rests with the proponents usually require them to prove soundness of mind upon the part of the testator to the satisfaction of the court or jury,[6] or by a preponderance of the evidence.[7] The evidence of the proponent must be sufficient to outweigh that offered by the contestant.[8] And where the evidence leaves the question in doubt the finding should be against the will.[9] And an instruction that it is incumbent on those seeking to establish a will made by a person adjudged to be of unsound mind to show by clear, explicit, and satisfactory evidence that he had sufficient mental capacity, is not rendered objectionable by the use of the words "clear, explicit, and satisfactory" as an invasion of the province of the jury.[10] Nor will a requirement that the proponent shall prove the execution of the will, and that the contestants shall prove the unsoundness of mind by

[1] Re Cole's Will, 49 Wis. 179. And see Hawkins v. Grimes, 13 B. Mon. 257.

[2] Clements v. McGinn (Cal.) 33 Pac. 920.

[3] Prentis v. Bates, 88 Mich. 567.

[4] Miller v. White, 5 Redf. 320; Grubbs v. McDonald, 91 Pa. 236.

[5] Brooks v. Barrett, 7 Pick. 94; Hawkins v. Grimes, 13 B. Mon. 257.

[6] Delafield v. Parish, 25 N. Y. 9; Re Flansburgh, 82 Hun, 49; Chrisman v. Chrisman, 16 Or. 127; Vance v. Upson, 66 Tex. 476; Riddell v. Johnson, 26 Gratt. 152; Browning v. Budd, 6 Moore, P. C. 430. And see Keeler v. Keeler, 20 N. Y. S. R. 439.

[7] Robinson v. Adams, 62 Me. 369, 16 Am. Rep. 473; Williams v. Robinson, 42 Vt. 658, 1 Am. Rep. 359. And see Barber's Appeal, 63 Conn. 393, 22 L. R. A. 90.

[8] Aikin v. Weckerly, 19 Mich. 482.

[9] Sutton v. Sadler, 3 C. B. N. S. 87, 3 Jur. N. S. 1150.

[10] Stevens v. Stevens, 127 Ind. 560.

a preponderance of the evidence, justify a reversal, though the word "preponderance" might well have been omitted.[1] An absolute refusal, however, to charge the jury that they must rest their verdict upon a preponderance of proof, without any other instructions upon the point, is error, as tending to lead them to imply that they are not authorized to find the will well executed upon a balance of the testimony.[2] The presumption of sanity cannot be given the effect of an independent fact to serve as a substantial make-weight against counter proof; and a charge that if the jury should find the evidence to be balanced they should permit the legal presumption of sanity to decide the question is erroneous.[3] Whatever force is given to the presumption is due, not to its own intrinsic weight as a distinct item of proof, but to its operation in rendering the circumstances adduced more persuasive.[4] But where upon the whole evidence it is doubtful whether the party is sane or insane, the presumption in favor of sanity may decide the question.[5] So, the presumption against suicide, that a person who took poison did it unintentionally or by mistake, is a disputable one standing for the fact only until overcome by a preponderance of the evidence.[6]

III. Presumption of continuance.

§ 1. *Habitual insanity.*

When habitual, chronic, or continuous insanity is once proved to exist it is presumed to continue until the contrary is shown,[7]

[1] Morris v. Morton, 14 Ky. L. Rep. 360.

[2] Aikin v. Weckerly, 19 Mich. 482. And see Barber's Appeal, 63 Conn. 393, 22 L. R. A. 90.

[3] McGinnis v. Kempsey, 27 Mich. 363.

[4] McGinnis v. Kempsey, 27 Mich. 363.

[5] Hawkins v. Grimes, 13 B. Mon. 257; Brooks v. Barrett, 7 Pick. 94.

[6] Bachmeyer v. Mutual Reserve Fund L. Asso. 87 Wis. 328.

[7] Wray v. Wray, 33 Ala. 187; Pike v. Pike, 104 Ala. 642; State v. Johnson, 40 Conn. 136; Duffield v. Robeson, 2 Harr. (Del.) 375; Armstrong v. Timmons, 3 Harr. (Del.) 342; State v. Brown, Houst. Crim. Rep. 539; Armstrong v. State, 30 Fla. 170, 17 L. R. A. 484; Dicken v. Johnson, 7 Ga. 484; Langdon v. People, 133 Ill. 382; Menkins v. Lightner, 18 Ill. 282; Goodwin v. State, 96 Ind. 550; Wallis v. Luhring, 134 Ind. 447; Rush v. Megee, 36 Ind. 69; Corbit v. Smith, 7 Iowa, 60, 71 Am. Dec. 431; State v. Reddick, 7 Kan. 143; Hawkins v. Grimes, 13 B. Mon. 257; Carpenter

in the absence of an allegation of restoration of soundness;[1] and it is not necessary to allege that the party had not been subsequently restored to reason;[2] and the burden rests with the party asserting it of proving restoration or a lucid interval at the very time of the act in question.[3] The presumption that insanity con-

v. Carpenter, 8 Bush, 283; Weston v. Higgins, 40 Me. 102; Halley v. Webster, 21 Me. 461; Wright v. Wright, 139 Mass. 177; Ricketts v. Jolliff, 62 Miss. 440; Mullins v. Cottrell, 41 Miss. 291; State v. Lowe, 93 Mo. 547; Boylan v. Meeker, 28 N. J. L. 274; State v. Spencer, 21 N. J. L. 196; Cook v. Cook, 53 Barb. 180; Hall v. Unger, 2 Abb. (U. S.) 507; Dexter v. Hall, 82 U. S. 15 Wall. 9, 21 L. ed. 73; Com. v. Winnemore, 1 Brewst. (Pa.) 356; Aurentz v. Anderson, 3 Pittsb. 310; Grabill v. Barr, 5 Pa. 441, 47 Am. Dec. 418; Rogers v. Walker, 6 Pa. 371, 47 Am. Dec. 470; Fowlis v. Davidson, 6 Notes of Cases, 461; Kinloch v. Palmer, 1 Mill. Const. 215; Green v. State, 88 Tenn. 614; Haynes v. Swann, 6 Heisk. 560; Puryear v. Reese, 6 Coldw. 21; Leache v. State, 22 Tex. App. 279, 58 Am. Rep. 638; Webb v. State, 5 Tex. App. 596; Overall v. State, 15 Lea, 672; State v. Wilner, 40 Wis. 304; Smith v. Tebbitt, L. R. 1 Prob. & Div. 401, 36 L. J. Prob. N. S. 35, 15 L. T. N. S. 594.

[1] Wade v. State, Nix, 37 Ind. 180.

[2] Physio-Medical College v. Wilkinson, 108 Ind. 314.

[3] Pike v. Pike, 104 Ala. 642; O'Donnell v. Rodiger, 76 Ala. 222, 52 Am. Rep. 322; Saxon v. Whitaker, 30 Ala. 237; Armstrong v. Timmons, 3 Harr. (Del.) 342; Cubbage v. Cubbage, 1 Harr. (Del.) 461, note; Frazer v. Frazer, 2 Del. Ch. 260; Dicken v. Johnson, 7 Ga. 484; Griffin v. Griffin, R. M. Charlt. 217; Menkins v. Lightner, 18 Ill. 282; Emery v. Hoyt, 46 Ill. 258; Kenworthy v. Williams, 5 Ind. 375; Achey v. Stephens, 8 Ind. 411; Corbit v. Smith, 7 Iowa, 60, 71 Am. Dec. 431; Bever v. Spangler, 93 Iowa, 576; Blake v. Rourke, 74 Iowa, 522; Halley v. Webster, 21 Me. 461; Higgins v. Carlton, 28 Md. 115, 92 Am. Dec. 666; Ricketts v. Jolliff, 62 Miss. 440; State v. Lowe, 93 Mo. 547; State v. Schaefer, 116 Mo. 96; Whitenack v. Stryker, 2 N. J. Eq. 8; Goble v. Grant, 3 N. J. Eq. 629; Turner v. Cheesman, 15 N. J. Eq. 243; Cook v. Cook, 53 Barb. 180; Hall v. Unger, 2 Abb. (U. S.) 507; Dexter v. Hall, 82 U. S. 15 Wall. 9, 21 L. ed. 73; People v. Montgomery, 13 Abb. P. R. N. S. 207; Jackson, Caldwell, v. King, 4 Cow. 207, 15 Am. Dec. 354; Jackson, Van Dusen, v. Van Dusen, 5 Johns. 144, 4 Am. Dec. 330; Clark v. Fisher, 1 Paige, 171, 19 Am. Dec. 402; Morse v. Scott, 4 Dem. 507; Morrison v. Smith, 3 Bradf. 209; Ballew v. Clark, 2 Ired. L. 23; Grabill v. Barr, 5 Pa. 441, 47 Am. Dec. 418; Rogers v. Walker, 6 Pa. 371, 47 Am. Dec. 470; Harden v. Hays, 9 Pa. 151; Wilson v. Mitchell, 101 Pa. 495; Landis v. Landis, 1 Grant, Cas, 248; Aurentz v. Anderson, 3 Pittsb. 310; Fowlis v. Davidson, 6 Notes of Cases, 461; Lee v. Lee, 4 McCord, L. 183, 17 Am. Dec. 722; Puryear v. Reese, 6 Coldw. 21; Hunt v. State, 33 Tex. Crim. Rep. 252; Vance v. Upson, 66

tinues is not a presumption of law but an inference of fact varying with the circumstances of the case.[1] And it is a question of fact, in view of the consideration of the whole case, whether a disability once shown to have existed continued to exist until the time in question.[2] At most the presumption is one partly of law and partly of fact.[3] It is for the jury to say upon all the evidence what the character of the insanity was in that respect.[4] And where there is evidence upon the issue of sanity it is error to instruct that the law raises a presumption one way or the other.[5] And such presumption may be rebutted by proof of a change of mental condition or lucid interval at the time of the act which is called in question.[6]

These rules apply to criminal prosecutions, and where confirmed or habitual insanity is established as distinguished from temporary or spasmodic insanity the prosecution is bound to prove that the criminal act was committed during a lucid interval or after restoration.[7] It devolves upon the state in such cases to

Tex. 476; Fishburne v. Ferguson, 84 Va. 87; Burton v. Scott, 3 Rand. 399; Den, Stevens, v. Vancleve, 4 Wash. C. C. 262; Jarrett v. Jarrett, 11 W. Va. 584; Anderson v. Cranmer, 11 W. Va. 562; Hoge v. Fisher, Pet. C. C. 163; Young v. Young, 10 Grant, Ch. (U. C.) 365; Russell v. Lefrancois, 8 Can. S. C. 335; Attorney General v. Pranther, 3 Bro. Ch. 441; Groom v. Thomas, 2 Hagg. Eccl. Rep. 433; Smee v. Smee, L. R. 5 Prob. Div. 84, 28 Week. Rep. 703, 44 J. P. 220; Smith v. Tebbitt, L. R. 1 Prob. & Div. 401, 36 L. J. Prob. N. S. 35, 15 L. T. N. S. 594; Cartwright v. Cartwright, 1 Phillim. Eccl. Rep. 90; Symes v. Green, 1 Swab. & T. 401; White v. Driver, Phillim. Eccl. Rep. 84; White v. Wilson, 13 Ves. Jr. 87; Nichols v. Binns, 1 Swab. & T. 239. But see Fay v. Burditt, 81 Ind. 435, 42 Am. Rep. 142.

[1] Manley v. Staples, 65 Vt. 370; Missouri P. R. Co. v. Brazzil, 72 Tex. 233.

[2] Fay v. Burditt, 81 Ind. 435, 42 Am. Rep. 142.

[3] Webb v. State, 5 Tex. App. 596.

[4] Manley v. Staples, 65 Vt. 370; Townshend v. Townshend, 7 Gill. 10.

[5] Missouri P. R. Co. v. Brazzil, 72 Tex. 233; Manley v. Staples, 65 Vt. 370.

[6] Mullins v. Cottrell, 41 Miss. 291; Snow v. Benton, 28 Ill. 306; State v. Spencer, 21 N. J. L. 196. And see Armstrong v. State, 30 Fla. 170, 17 L. R. A. 484.

[7] People v. Montgomery, 13 Abb. Pr. N. S. 207; State v. Johnson, 40 Conn. 136; Armstrong v. State, 30 Fla. 170, 17 L. R. A. 484; State v. Reddick, 7 Kan. 143; Ford v. State, 73 Miss. 734, 35 L. R. A. 117; State v.

prove that the accused was sane enough to know right from wrong.[1] And it has been held that proof to rebut the presumption must be beyond a reasonable doubt.[2] But where prior insanity is not shown it is not necessary to prove that the act was committed during a lucid interval.[3] And failure to instruct that the burden rests with the state to show that the act was done during a lucid interval is not error where the evidence shows that if the accused was insane at any time he continued so and had no such thing as lucid intervals.[4] Nor is a refusal to instruct with reference to the presumption of continuance erroneous where there is nothing to show whether there was any evidence upon which to base an instruction,[5] or where the bare fact that the defendant had been transferred from the penitentiary to the insane hospital several years before is the only evidence of unsoundness of mind.[6]

So, the presumption of continuance applies to actions on contracts, and where a party is afflicted with insanity of a permanent nature, and insanity is alleged as a defense, he who claims performance must prove that it was entered into during a lucid interval,[7] or that he had recovered and was *compos mentis*.[8] And where general insanity on the part of a grantor is shown it is presumed to continue to the time of the execution of the deed in question;[9] and the burden of proving sanity rests with the person offering it in evidence or claiming under it.[10] And the same

Schaefer, 116 Mo. 96; State v. Lowe, 93 Mo. 547; Com. v. Winnemore, 1 Brewst. (Pa.) 356; Hunt v. State, 33 Tex. Crim. Rep. 252; State v. Brown, Houst. Crim. Rep. (Del.) 539.

[1] State v. Lowe, 93 Mo. 547.

[2] State v. Reddick, 7 Kan. 143; Hunt v. State, 33 Tex. Crim. Rep. 252.

[3] State v. Schaefer, 116 Mo. 96.

[4] State v. Schaefer, 116 Mo. 96.

[5] People v. Smith, 57 Cal. 130.

[6] Langdon v. People, 133 Ill. 382.

[7] Emery v. Hoyt, 46 Ill. 258; Wade v. State, Nix, 37 Ind. 180.

[8] Russell v. Lefrançois, 8 Can. S. C. 353; Ricketts v. Jolliff, 62 Miss. 440,

[9] Rogers v. Walker, 6 Pa. 371, 47 Am. Dec. 470; Aurentz v. Anderson, 3 Pittsb. 310; Dicken v. Johnson, 7 Ga. 484; Raymond v. Wathen, 142 Ind. 367.

[10] Pike v. Pike, 104 Ala. 642; Dicken v. Johnson, 7 Ga. 484; Ballew v. Clark, 2 Ired. L. 23; Rogers v. Walker, 6 Pa. 371, 47 Am. Dec. 470;

rule applies to mortgages.[1] And the recovery or lucid interval must be such as to enable the grantor or mortgagor to comprehend intelligently the nature and character of the transaction in which he is engaged.[2]

So, the same doctrine is applicable to wills, and where permanent insanity of the testator is shown previous to the making of his will its continuance is presumed.[3] And where he is proved to have been insane at the date of the execution of his will it will be presumed, until the contrary is shown, that he continued in that state of mind and was incompetent at the date of a subsequent alteration in his will.[4] Proof of previous insanity destroys the presumption in favor of sanity,[5] and casts the burden of proof upon those who support the will to show restoration to sanity or a lucid interval at the time by satisfactory proof.[6] And they are entitled to open and close,[7] and must prove sanity at the very moment the will was made,[8] and that he had memory, understanding, and judgment sufficient to execute a valid will,[9] proof of a lucid inter-

Aurentz v. Anderson, 3 Pittsb. 310; Jarrett v. Jarrett, 11 W. Va. 584; Anderson v. Cranmer, 11 W. Va. 562; Hoge v. Fisher, Pet. C. C. 163; Young v. Young, 10 Grant, Ch. (U. C.) 365.

[1] Ripley v. Babcock, 13 Wis. 425.

[2] Pike v. Pike, 104 Ala. 642.

[3] Kinloch v. Palmer, 1 Mill. Const. 215; Boylan v. Meeker, 28 N. J. L. 274. And see Clark v. Ellis, 9 Or. 128.

[4] Hawkins v. Grimes, 13 B. Mon. 257.

[5] Turner v. Rusk, 53 Md. 65.

[6] O'Donnell v. Rodiger, 76 Ala. 222, 52 Am. Rep. 322; Cubbage v. Cubbage, 1 Harr. (Del.) 461, note; Griffin v. Griffin, R. M. Charlt. 217; Kenworthy v. Williams, 5 Ind. 375; Harrison v. Bishop, 131 Ind. 161; Halley v. Webster, 21 Me. 461; Turner v. Cheesman, 15 N. J. Eq. 243; Goble v. Grant, 3 N. J. Eq. 629; Whitenack v. Stryker, 2 N. J. Eq. 8; Clark v. Fisher, 1 Paige, 171, 19 Am. Dec. 402; Re Jones's Estate, 2 Ohio Dec. 409; Harden v. Hays, 9 Pa. 151; Landis v. Landis, 1 Grant, Cas. 248; Lee v. Lee, 4 McCord, L. 183, 17 Am. Dec. 722; Vance v. Upson, 66 Tex. 476; Burton v. Scott, 3 Rand. 399; White v. Wilson, 13 Ves. Jr. 87; White v. Driver, 1 Phillim. Eccl. Rep. 84; Cartwright v. Cartwright, 1 Phillim. Eccl. Rep. 90; Groom v. Thomas, 2 Hagg. Eccl. Rep. 433; Taylor v. Creswell, 45 Md. 422; Higgins v. Carlton, 28 Md. 115, 92 Am. Dec. 666; Den, Stevens, v. Vancleve, 4 Wash. C. C. 262.

[7] Cubbage v. Cubbage, 1 Harr. (Del.) 461, note.

[8] Jackson, Van Dusen, v. Van Dusen, 5 Johns. 144, 4 Am. Dec. 330.

[9] Landis v. Landis, 1 Grant, Cas. 248.

val being required to be made to the satisfaction of the jury.[1] The rule in Massachusetts, however, is that proof of previous insanity may make out a prima facie case, but the burden of proof does not shift.[2]

So, the burden of proving restoration to reason, and the dissolution or abandonment of the guardianship of one who had been insane, rests upon the person seeking to enforce a contract against which insanity is pleaded.[3] But an adjudication of insanity, followed by a commitment of the patient to the asylum for the insane, does not create a conclusive presumption of the continuance of the insanity seven years after the discharge of the patient from the asylum.[4] And the presumption of continued insanity of a man adjudged insane, who marries a woman with whom he lives for more than thirty years, will not prevail against the presumption of the legality of the marriage.[5]

§ 2. *Temporary insanity.*

Insanity which is not shown to be settled or general as contradistinguished from mere temporary aberration or hallucination is not presumed to continue until the contrary is shown.[6] Fitful and exceptional attacks of insanity are not presumed to be continuous.[7] And the existence of prior or subsequent lunacy, except where it is habitual, does not suffice to change the burden of proof.[8] And where an insane person has lucid intervals offenses committed by him will be presumed to have been committed in a lucid interval unless the contrary appears.[9] The

[1] Vance v. Upson, 66 Tex. 476.

[2] Wright v. Wright, 139 Mass. 177.

[3] Elston v. Jasper, 45 Tex. 409; Re Hooper's Estate, 174 Pa. 373.

[4] Mutual L. Ins. Co. v. Wiswell, 56 Kan. 756, 35 L. R. A. 258.

[5] Castor v. Davis, 120 Ind. 231.

[6] People v. Francis, 38 Cal. 183; Turner v. Rusk, 53 Md. 65; Murphree v. Senn, 107 Ala. 424; McMasters v. Blair, 29 Pa. 298; Langdon v. People, 133 Ill. 382.

[7] Leache v. State, 22 Tex. App. 279, 58 Am. Rep. 638; Ward v. State, 19 Tex. App. 664; Ford v. State, 71 Ala. 385; Carpenter v. Carpenter, 8 Bush, 283. And see Weston v. Higgins, 40 Me. 102; Halley v. Webster, 21 Me. 461; Puryear v. Reese, 6 Coldw. 21.

[8] Hall v. Unger, 2 Abb. (U. S.) 507; Dexter v. Hall, 82 U. S. 15 Wall. 9, 21 L. ed. 73; Corbit v. Smith, 7 Iowa, 60, 71 Am. Dec. 451.

[9] Ford v. State, 71 Ala. 385.

maxim "Once insane presumed always to be insane" does not apply where the malady or delusion under which the alleged insane person labored was in its nature accidental or temporary,[1] or the effect of some sickness or disease.[2] And where insanity directly connected with some violent disease is shown, the party alleging it must bring his proof of continued insanity to that point of time which bears directly upon the subject in controversy.[3] Thus, a party seeking to avoid a contract by reason of temporary insanity resulting from disease must show its existence at the time the contract was made, and that it was of a character affecting the capacity of the party to make it.[4] And the mere fact of previous insanity upon the part of a grantor does not render evidence of insanity at the time of making a deed unnecessary where such insanity was not habitual.[5]

So, occasional fits of insanity or aberration of mind produced by temporary causes are not sufficient to shift the burden of proof in a will contest to the proponent to show that the will was made during a lucid interval.[6] And the burden of proof upon the contest of a will made by a person suffering from a complication of troubles, who at times suffered great pain and became deranged, rests with the contestants to show that the will was made while the testator was suffering from one of such temporary derangements.[7] So, refusal to give a sufficient instruction to the effect that the law presumes insanity to continue after it is once shown to exist is not error in a criminal prosecution in a case of recurrent insanity.[8] And where only temporary or recurrent insanity is shown without raising any reasonable doubt as to

[1] Townshend v. Townshend, 7 Gill, 10.

[2] Hix v. Whittemore, 4 Met. 545; Staples v. Wellington, 58 Me. 453; Richardson v. Smart, 2 Mo. App. Rep. 1107; Webb v. State, 5 Tex. App. 596.

[3] O'Donnell v. Rodiger, 76 Ala. 222, 52 Am. Rep. 322; Blake v. Rourke, 74 Iowa, 519; Hix v. Whittemore, 4 Met. 545.

[4] Staples v. Wellington, 58 Me. 453; Trimbo v. Trimbo, 47 Minn. 389.

[5] Aurentz v. Anderson, 3 Pittsb. 310; Stewart v. Flint, 59 Vt. 144.

[6] O'Donnell v. Rodiger, 76 Ala. 222, 52 Am. Rep. 322; Clark v. Ellis, 9 Or. 128; Reichenbach v. Ruddach, 127 Pa. 564.

[7] Blake v. Rourke, 74 Iowa, 519.

[8] Leache v. State, 22 Tex. App. 279, 58 Am. Rep. 638; Smith v. State, 22 Tex. App. 316.

whether or not it existed at the time of the commission of the act in question the presumption of general sanity may be relied on without offering proof of a lucid interval.[1] But an instruction that insanity is presumed to continue is not erroneous as an abstract proposition of law, and is not subject to exception because there was no evidence upon which it could be based,[2] or because it was unaccompanied by any qualification with reference to temporary insanity, where no such qualification was requested,[3] or where the testimony does not indicate a transient insanity.[4]

§ 3. *Habitual and temporary insanity distinguished.*

The presumption of continuance of insanity once established applies to cases of habitual or apparently confirmed insanity of whatever nature, but does not apply to cases of occasional or temporary insanity.[5] And in order to raise a presumption of continuance it must be of a permanent type or of a continuing nature or possessed of the characteristics of an habitual and confirmed disorder of the mind.[6] And it must appear to have been of such duration and character as to indicate the probability of its continuance, and not simply the possibility or probability of its recurrence.[7] And there should be some evidence tending to show settled insanity as contradistinguished from temporary aberration or hallucination, to justify an instruction which does not recognize such a distinction.[8]

Insanity produced by disease in which eventual recovery is possible or probable, though necessarily slow, is not habitual insanity which will shift the burden of proof to show a lucid interval at the time of making a deed.[9] Nor is delirium or imbecility resulting from violent or acute disease.[10] Nor does the pre-

[1] Ford v. State, 73 Miss. 734, 35 L. R. A. 117.
[2] Weston v. Higgins, 40 Me. 102.
[3] Norman v. Georgia Loan & T. Co. 92 Ga. 295.
[4] Fulwider v. Ingels, 87 Ind. 414.
[5] State v. Wilner, 40 Wis. 304; Corbit v. Smith, 7 Iowa, 60, 71 Am. Dec. 431.
[6] Langdon v. People, 133 Ill. 382. And see Stewart v. Redditt, 3 Md. 67.
[7] People v. Schmitt, 106 Cal. 48; Langdon v. People, 133 Ill. 382.
[8] People v. Francis, 38 Cal. 183.
[9] Turner v. Rusk, 53 Md. 65.
[10] Clarke v. Sawyer, 3 Sandf. Ch. 351.

sumption of the continuance of the incapacity once established apply to insanity induced by epilepsy, where the paroxysms are periodical.[1] And insanity of one who is rendered entirely unconscious and of unsound mind and memory by a stroke of paralysis is not presumed to continue for four months thereafter so as to invalidate a deed then made.[2] And where a testator labored for four or five months under a severe attack of apoplexy, suffering the deprivation of reason at the outset, which was gradually restored on recovery, he is not to be deemed generally insane where he survives four years thereafter without an intervening attack.[3] So, bare proof of mental unsoundness a few years after the execution of the will without regard to its nature and character, whether permanent or temporary, is not sufficient to rebut the presumption in favor of sanity.[4] And proof that on the day a will was signed the testatrix was flighty but knew what she was doing a part of the time is not sufficient to cast on the proponent the burden of showing that she was sane at the particular moment the will was made.[5] And the question whether a testator who executed a will in the afternoon and was proved to have been wholly unconscious in the morning could have recovered possession of his mental faculties so as to enable him to make a valid will is one for the jury under the evidence.[6]

The presumption of continuance of an insane condition, however, applies to periodical lunacy as well as to habitual or permanent derangement.[7] And occasional incapacity of a testator arising from nervous attacks, their effect being of different duration, during which he is incapable of any rational act, renders his capacity conflicting, and imposes upon the party claiming under his will the obligation of proving that the will was made during capacity.[8] And the insane condition of a person subject to occasional and temporary attacks of insanity, one of which visited

[1] Carpenter v. Carpenter, 8 Bush, 283; Brown v. Riggin, 94 Ill. 560.
[2] Trish v. Newell, 62 Ill. 196.
[3] Clarke v. Sawyer, 3 Sandf. Ch. 351.
[4] Taylor v. Creswell, 45 Md. 422.
[5] O'Donnell v. Rodiger, 76 Ala. 222, 52 Am. Rep. 322.
[6] Re Heenan's Estate, 15 Phila. 545.
[7] Overall v. State, 15 Lea, 672. And see Thompson v. Kyner, 65 Pa. 368.
[8] Kinleside v. Harrison, 2 Phillim. Eccl. Rep. 449.

him shortly before the commission of a criminal act, will be presumed to have continued where recovery is not shown.[1] So, delusions or unsoundness of mind once proved are presumed to exist although not at all times and under all circumstances equally apparent.[2] And the burden of proof that a testator who had been subject to delusions was free from them at the time of making his will rests with those who assert that he was of sound and disposing mind.[3] Where insanity once existed in the shape of delusions the absence of the delusions is the test of restoration, and where the evidence in a will contest fails to show the application of such test the will may be pronounced against on the ground of failure of proof.[4] But where there is proof of general rationality, and also of delusions, the court will not assume that the delusion was habitual.[5] And proof of a delusion on the part of a party to a contract that his lands were wearing out, and that his plantation was going to ruin, and that he was threatened with starvation, does not show such a state of lunacy as will throw the burden of showing a lucid interval upon the other party.[6]

So, insanity founded upon an inquisition of lunacy or a judicial determination is presumed to continue, and the burden of proof rests with those asserting restoration or a lucid interval to show it.[7] But where the insanity of a person accused of crime has been established by the fact of his commitment to a lunatic asylum it cannot be said, as matter of law, that it is presumed to continue to exist until overthrown by proof of a final discharge; such presumption may be rebutted by any satisfactory evidence of resto-

[1] Overall v. State, 15 Lea, 672.

[2] Fowlis v. Davidson, 6 Notes of Cases, 461.

[3] Boughton v. Knight, 28 L. T. N. S. 562, L. R. 3 Prob. & Div. 64, 42 L. J. Prob. N. S. 41; Smee v. Smee, L. R. 5 Prob. Div. 84, 28 Week. Rep. 703, 44 J. P. 220; Waring v. Waring, 12 Jur. 947; Jenckes v. Smithfield Court of Probate, 2 R. I. 255.

[4] Grimani v. Draper, 12 Jur. 925.

[5] Townshend v. Townshend, 7 Gill, 10.

[6] Gillespie v. Schuliberrier, 5 Jones, L. 157. And see Staples v. Wellington, 58 Me. 453; Townshend v. Townshend, 7 Gill, 10.

[7] Terry v. Buffington, 11 Ga. 337, 56 Am. Dec. 423; Harrison v. Bishop, 131 Ind. 161; Lilly v. Waggoner, 27 Ill. 395; Haynes v. Swann, 6 Heisk. 560; Prinsep v. Dyce Sombre, 10 Moore, P. C. 232. And see Leckey v. Cunningham, 56 Pa. 370.

ration.[1] And the presumption of continued insanity of a married man, arising from an adjudication thereof, is overcome by evidence that he deserted his family and resided for several years in another state where he was considered sane, and where he procured a divorce on service by publication.[2] Nor does the confinement of a man ten years before in an insane asylum create a presumption that his insanity still continues where such confinement was followed by at least eight years of successful practice as a physician.[3] So, no presumption of absolute recovery arises from lapse of time alone; something more is required to relieve the person asserting it of the burden of proof.[4] But insanity once established will not be presumed to continue where too long a period has elapsed between the proved insanity and the date of the subsequent inquiry.[5] And the fact that insanity had continued for a number of years would be strong, though not conclusive, evidence of permanence.[6]

There is no presumption, either of law or of fact, of recovery from mental weakness accompanied by and probably resulting from the infirmities of old age.[7] But where a will is made upon a death bed shortly before death, and stupor from drugs or delirium is shown, there is no presumption that it was made during a lucid interval, though such intervals are shown to have existed.[8] And the burden of proof rests with the proponents of a will made by a testator afflicted with senile dementia to show that at the very time of its execution he was of sound mind.[9] So, insanity through intemperance is of a temporary nature, and followed, not simply by a lucid interval, but by permanent restoration of reason, and to such insanity the presumption of continuance does not apply.[10] And delirium tremens brought on by one's

[1] State v. Davis, 27 S. C. 609.
[2] Rodgers v. Rodgers, 56 Kan. 483.
[3] Langdon v. People, 133 Ill. 382.
[4] Norton v. New York Hospital, 3 Abb. N. C. 229.
[5] Langdon v. People, 133 Ill. 382.
[6] Manley v. Staples, 65 Vt. 370.
[7] Physio-Medical College v. Wilkinson, 108 Ind. 314.
[8] Elliott v. Welby, 13 Mo. App. 19.
[9] Bever v. Spangler, 93 Iowa, 576.
[10] Duffield v. Robeson, 2 Harr. (Del.) 379; Re Lee, 46 N. J. Eq. 193; Goble v. Grant, 3 N. J. Eq. 629; Kahl v. Schober, 35 N. J. Eq. 461; Gard-

own procurement and passing away with the removal of its exciting cause is not presumed to continue.[1] And where it is set up as a defense in a criminal prosecution the existence of a paroxysm of a disorder at the very time the criminal act was done must be established.[2] But when alcoholism has produced permanent derangement it is presumed to continue, and proof of a lucid interval is necessary to give validity to subsequent acts.[3] And evidence of a mere sober interval of a few hours or days is not sufficient to sustain a contract made by one who had been subject to fits of delirium tremens for nearly four years, and was in the habit of daily drunkenness, and had become foolish and cross when drinking.[4] So, the incapacity arising from the use of morphine by one who did not have the habit fixed upon him would be but temporary, and there is no presumption in favor of a continuance of such incapacity.[5]

§ 4. *Presumption of continuance of a lucid interval.*

A lucid interval is in its nature temporary and uncertain in its duration, and there is no legal presumption of its continuance.[6] And the fact that a testator proved to be insane had lucid intervals on the morning of the execution of his will does not shift the burden of proof to the contestant to show that he was not in a lucid state when he executed the instrument.[7] And delusion or unsoundness of mind proved to have existed both before and after a designated period will be presumed to have existed at that time unless it satisfactorily appears that the party had entirely recovered and had not afterwards suffered a relapse.[8] It has been held, however, that where a lucid interval is established

ner v. Gardner, 22 Wend. 526, 34 Am. Dec. 340; Black v. Ellis, 3 Hill, L. 68; Bannister v. Jackson, 45 N. J. Eq. 702; Elkinton v. Brick, 44 N. J. Eq. 154, 1 L. R. A. 161; Andress v. Weller, 3 N. J. Eq. 604.

[1] State v. Potts, 100 N. C. 457; Goodwin v. State, 96 Ind. 550.

[2] State v. Sewell, 3 Jones, L. 245; Goodwin v. State, 96 Ind. 550.

[3] Gardner v. Gardner, 22 Wend. 526, 34 Am. Dec. 340; State v. Potts, 100 N. C. 457; Re Cockran's Will, 1 T. B. Mon. 264, 15 Am. Dec. 116.

[4] Menkins v. Lightner, 18 Ill. 282.

[5] Camp v. Shaw, 52 Ill. App. 241.

[6] Pike v. Pike, 104 Ala. 642.

[7] Saxon v. Whittaker, 30 Ala. 237.

[8] Fowlis v. Davidson, 6 Notes of Cases, 461.

upon the part of a grantor who was previously insane a short time before the execution of his deed the burden is thereby placed upon the party claiming insanity to show that he had again become insane at the time of its execution.[1] And the fact that a testator had been insane some years prior to the execution of his will creates no presumption of insanity at that time,—especially where it appears that he subsequently became lucid and continued so until the time of his death. [2]And when a will is proved to have been made by the testator himself unaided by others, and its provisions are wise and judicious, a presumption is established, even in case of a person habitually insane, that it was made during a lucid interval, which imposes upon those who attack it the burden of proving insanity at the moment it was made.[3]

IV. Competency and admissibility.

§ 1. *Previous and subsequent condition of mind.*

Evidence of the state of mind of a person accused of crime before and after the commission of the act is admissible where insanity is alleged as a defense, as tending to show his mental condition at the time,[4] and may be given under a plea of not guilty.[5] The mental condition of a person accused of murder for at least a month before the act is a part of the history of the case which may be taken into account in considering his mental condition at the time.[6] And the general character of the accused for weeks previous to the alleged commission of a larceny is ad-

[1] Wright v. Jackson, 59 Wis. 569.

[2] Snow v. Benton, 28 Ill. 306.

[3] Kingsbury v. Whitaker, 32 La. Ann. 1055, 36 Am. Rep. 278; Re Bey's Succession, 46 La. Ann. 773, 24 L. R. A. 577.

[4] McAllister v. State, 17 Ala. 434, 52 Am. Dec. 180; McLean v. State, 16 Ala. 672; People v. Lee Fook, 85 Cal. 300; People v. Farrell, 31 Cal. 576; Carr v. State, 96 Ga. 284; State v. Jones, 64 Iowa, 356; State v. Felter, 25 Iowa, 67; Moore v. Com. 92 Ky. 630; Montgomery v. Com. 88 Ky. 509; State v. Kelley, 57 N. H. 549; Russell v. State, 53 Miss. 367; People v. Whedon, 2 N. Y. Crim. Rep. 318; Wilkinson v. Pearson, 23 Pa. 117; Burkhardt v. State, 18 Tex. App. 599; Warren v. State, 9 Tex. App. 619.

[5] People v. Farrell, 31 Cal. 576; Carr v. State, 96 Ga. 284.

[6] State v. Harragan, 9 Houst. (Del.) 369.

missible where the testimony is not of a conflicting character as tending to show his honesty and the general condition of his mind.[1] So, the superintendent of an asylum to which a person accused of crime who pleads insanity is sent may testify upon a subsequent trial for the offense as to his condition while in the asylum, and as to whether he had recovered his sanity sufficiently to be tried.[2] And evidence of the acts and conduct of the complainant in a criminal prosecution, who is called as a witness and claimed to have been insane, bearing upon his mental condition prior to the date of the alleged offense, is admissible as tending to show his sanity at that time.[3] Previous and subsequent mental condition, however, is competent only as tending to throw light on the condition of the mind of the accused at the time of the commission of the crime.[4] And evidence of the acts, conduct, and habits of the accused at a subsequent time are only admissible upon the ground that they are so connected with or correspond with evidence of destroyed or weakened mental condition preceding the offense as to strengthen the inference of continuance, and carry it beyond the time to which the inquiry relates,[5] and is not to be admitted unless followed up by proof of facts tending to show the accused was insane or deranged at the time of the offense;[6] though it may be given without first proving insanity at the time of the commission of the act.[7] The interval of time within which the acts, conduct, and habits of a person accused of crime can be reviewed as bearing upon the question of his sanity at the time of the commission of the act is to be measured with reference to the intervening evidence.[8] And evidence of character and conduct prior to a certain date is properly rejected where the claim is made that the insanity commenced at that time.[9] Nor can the opinion of witnesses as to

[1] Johnson v. State, 1 Tex. App. 146.
[2] State v. Pritchett, 106 N. C. 667.
[3] State v. Kelley, 57 N. H. 549.
[4] State v. Martin (N. J.) 3 Crim. Law Mag. 44; State v. Hays, 22 La. Ann. 39; People v. Clendennin, 91 Cal. 35.
[5] Com. v. Pomeroy, 117 Mass. 143; State v. Lewis, 20 Nev. 333.
[6] Spencer v. State, 69 Md. 28.
[7] Vance v. Com. 2 Va. Cas. 132.
[8] Com. v. Pomeroy, 117 Mass. 143.
[9] Webber v. Com. 119 Pa. 223.

what was undue and unnatural excitement in time of battle afford ground for a conclusion as to the mental condition of the party years afterwards, unless it appears that the excitement mastered the intellect and deprived the party of accountability.[1]

So, evidence of the state of mind of the party to a contract both before and after the time it is made is admissible to show his sanity or insanity at that time,[2] or to show that the other party had notice of such insanity.[3] And evidence of the incapacity of a payee when a note was given him is admissible as tending to prove his incapacity to make a valid transfer at the time when he subsequently indorsed it.[4] So, evidence tending to prove the sanity or insanity of a grantor previous or subsequent to the execution of a deed is admissible in an action to set it aside as tending to show his mental condition at the time it was made.[5] But no absolute rule as to the duration of the period within which such inquiry may be made, to be universally applied, can be laid down.[6] Where evidence of previous insanity is given the same witnesses may testify as to the state of the party's mind subsequent to the act in question, and that the insanity was continuing and permanent in its character;[7] and his appearance may be noted at the trial when he does not appear to have changed since the act.[8] And evidence as to previous insanity may be rebutted by proof as to the subsequent condition of the party.[9] So, evidence of the sanity or insanity of a testator both before and after the date of his will is admissible, in a proceeding to contest the will, to show his mental condition at the

[1] People v. Garbutt, 17 Mich. 9, 97 Am. Dec. 162.

[2] Grant v. Thompson, 4 Conn. 203; Clinton v. Estes, 20 Ark. 216; Walker v. Clay, 21 Ala. 797; Beavan v. M'Donell, 26 Eng. L. & Eq. 540.

[3] Beavan v. M'Donell, 26 Eng. L. & Eq. 540.

[4] Peaslee v. Robbins, 3 Met. 164.

[5] Nichol v. Thomas, 53 Ind. 42; Ashcraft v. De Armond, 44 Iowa, 229; Wilkinson v. Pearson, 23 Pa. 117.

[6] Clinton v. Estes, 20 Ark. 216. And see White v. Graves, 107 Mass. 325, 9 Am. Rep. 38.

[7] Jerry v. Townshend, 9 Md. 145.

[8] Koile v. Ellis, 16 Ind. 301.

[9] Walker v. Clay, 21 Ala. 797.

time it was made,[1] great latitude being allowed in will cases.[2] Thus, evidence that the testator was fully cognizant of the amount of his property at a designated time is admissible as tending to show that he had the same knowledge a few months later, when he executed his will.[3] And evidence of his state of mind on the day previous is admissible, and where the will was made to supply the place of one executed on a previous day, which had been lost, it is part of the *res gestæ*.[4] So, where unsoundness of mind is proved to exist on the day the will is made or the instructions are given it is permissible to trace it both before and after that time up to the time of the testator's death.[5] And where senility is alleged it is competent to show that, subsequent to the date of the will, the testator's mind was free from every appearance of imbecility.[6] Nor will permitting a witness to state negatively that he did not observe anything peculiar about the mental condition of the testator at a time other than that when the will was executed furnish sufficient ground for an exception.[7] And witnesses with opportunities for observing may testify as to changes in the conduct and appearance of the testator as determined by observation made both before and after a designated date, where the question was one as to mental unsoundness beginning at a certain date indicated by changes in appearance and conduct,[8] the remoteness of the facts testified to going to the effect or weight or importance to be attached to the evidence,

[1] Knox v. Knox, 95 Ala. 495; Kramer v. Weinert, 81 Ala. 414; Moore v. Spier, 80 Ala. 129; Tobin v. Jenkins, 29 Ark. 151; Re Toomes's Estate, 54 Cal. 516; Dale's Appeal, 57 Conn. 127; Terry v. Buffington, 11 Ga. 337, 56 Am. Dec. 423; Staser v. Hogan, 120 Ind. 227; Colvin v. Warford, 20 Md. 357; Davis v. Calvert, 5 Gill & J. 269; Conely v. McDonald, 40 Mich. 150; Turner v. Cheesman, 15 N. J. Eq. 243; Whitenack v. Stryker, 2 N. J. Eq. 8; Swails v. White, 149 Pa. 261; Philadelphia Trust & S. D. Co. v. Drinkhouse, 17 Phila. 23; Ford v. Ford, 7 Humph. 92; Kerr v. Lunsford, 31 W. Va. 680, 2 L. R. A. 668; Stevens v. Vancleve, 4 Wash. C. C. 262.

[2] Robinson v. Adams, 62 Me. 369, 16 Am. Rep. 473.

[3] Carpenter v. Hatch, 64 N. H. 573.

[4] Dyer v. Dyer, 87 Ind. 13.

[5] Pidcock v. Potter, 68 Pa. 348, 8 Am. Rep. 181.

[6] Moore v. Spier, 80 Ala. 129.

[7] Robinson v. Adams, 62 Me. 369, 16 Am. Rep. 473.

[8] Shanley's Appeal, 62 Conn. 325.

rather than to its admissibility.[1] Unless it appears that the facts testified to were of such a nature as to show incompetency at the time of the will, however, the evidence amounts to nothing.[2] And where the testator is found to be possessed of a sound and disposing mind and memory at the time his will was made his previous and subsequent condition is not to be considered.[3] It is not admissible as an independent fact, in the absence of evidence as to the mental condition of the testator at the time of making the will,[4] and is only important as it throws light upon the actual condition of his mind at that time;[5] and is not admissible where it refers to the condition of mind long afterwards, and does not tend to show such unsoundness of mind as would invalidate a will.[6]

So, evidence of the insanity of a party about twenty years before taking out an insurance policy is not admissible in an action on the policy as tending to show a false representation in procuring it, or to show his insanity at the time of a subsequent suicide, in the absence of evidence tending to show insanity at the time the policy was issued.[7] But testimony taken by interrogatories ten years before in a former trial of the same case is admissible in an action brought for the discharge of a trustee which is defended upon the ground of insanity as tending to prove a permanent unsoundness of mind which might have continued to the time of the trial.[8] And evidence in an action for slander that the defendant was weak-minded, and at times both before and

[1] Conely v. McDonald, 40 Mich. 150. And see Ross v. McQuiston, 45 Iowa, 145; Robinson v. Adams, 62 Me. 369, 16 Am. Rep. 473; Fairchild v. Bascomb, 35 Vt. 398.

[2] Stevens v. Vancleve, 4 Wash. C. C. 262. And see Choice v. State, 31 Ga. 424; Com. v. Pomeroy, 117 Mass. 143.

[3] Grubbs v. McDonald, 91 Pa. 236; Dimond's Estate, 3 Pa. Dist. R. 554.

[4] Terry v. Buffington, 11 Ga. 337. And see Bowden v. People, 12 Hun, 85.

[5] Chrisman v. Chrisman, 16 Or. 127; Philadelphia Trust & S. D. Co. v. Drinkhouse, 17 Phila. 23. And see Ashcraft v. De Armond, 44 Iowa, 229.

[6] Dickie v. Carter, 42 Ill. 376; Pavey v. Wintrode, 87 Ind. 379; Kenworthy v. Williams, 5 Ind. 375.

[7] Blackstone v. Standard Life & A. Ins. Co. 74 Mich. 592, 3 L. R. A. 486.

[8] Obear v. Gray, 73 Ga. 455.

after speaking the slanderous words was totally deranged, is competent to be considered on the question of his insanity at that time,[1] though it has been said that the period of remoteness should not be extended further than for several months.[2]

It must be left to the presiding judge to determine upon the facts before him how far subsequent acts have a tendency to throw light upon the actual condition of the mind at the date of the act in question.[3] And evidence of the condition of the party's mind a year afterwards may be excluded, in the discretion of the trial judge, as too remote.[4] Nor can it be said that such discretion is erroneously exercised in excluding evidence of the mental condition of a person making an assignment which is sought to be invalidated eight months or more after the assignment, and after the person had been sent to the lunatic asylum.[5]

But testimony in a will contest covering a connected period of six years after the execution of the will is not too remote where it is claimed that the testator was afflicted with senile dementia, which, if existing at all, must of necessity be of long standing and progressive.[6] And evidence of subsequent capacity is admissible without regard to length of time, where the claim is weakness and imbecility from great age, and evidence of incapacity would be confined to a reasonable time after the making of the will.[7] It is for the party offering evidence of subsequent conduct and habits as tending to show the mental condition of the party at the time to show their competency as against the objection that they are subsequent in point of time, and that it is his own conduct offered in his favor.[8] The weight of evidence of subsequent acts with reference to the length of time elapsing, however, is for the determination of the jury.[9]

[1] Bryant v. Jackson, 6 Humph. 199; Dickinson v. Barber, 9 Mass. 225, 6 Am. Dec. 58.

[2] Dickinson v. Barber, 9 Mass. 225, 6 Am. Dec. 58.

[3] Shailer v. Bumstead, 99 Mass. 112.

[4] White v. Graves, 107 Mass. 325, 9 Am. Rep. 38.

[5] Wright v. Wright, 139 Mass. 177.

[6] Bever v. Spangler, 93 Iowa, 576. And see Ashcraft v. De Armond, 44 Iowa, 229.

[7] Re Pinney's Will, 27 Minn. 280.

[8] Com. v. Pomeroy, 117 Mass. 143.

[9] Dale's Appeal, 57 Conn. 127.

The condition of the mind of a testator after the making of his will is irrelevant and inadmissible in a proceeding to contest it, where the provisions depend for their operation upon the non-happening of events which come to pass.[1]

§ 2. *The act itself.*

In criminal law the act committed and its nature are not admitted as evidence on the question of the sanity or insanity of the perpetrator.[2] Where a will is offered for probate, however, it should be considered in connection with the other evidence in the case for the purpose of ascertaining whether the testator had testamentary capacity at the time of its execution.[3] And evidence tending to prove the unnatural character of a will is admissible upon the question of testamentary capacity.[4] So, consistency of a will with the natural inclinations and previously declared intentions of the testator is admissible in a will contest upon the issue of testamentary capacity.[5] And evidence tending to show that the legatees were all strangers to the testator is competent, as it is open to the contestants to argue that legacies to strangers indicate an unbalanced mind.[6] And evidence, where a bequest to a stranger is claimed to be unnatural, as to the way in which the wife of the legatee cared for the testator, is admissible.[7]

The exclusion of a certified copy of a record in a suit in equity, and the report of the master therein fixing the amount of interest of the son in a partnership with his father in a contest of the father's will, in which it is claimed that the son had transferred his share in the firm to his father for the purpose of facilitating the settlement, with the understanding that he would have all his

[1] Magee v. McNeil, 41 Miss. 17, 90 Am. Dec. 354.

[2] See Beasley v. State, 50 Ala. 149, 20 Am. Rep. 292; State v. Stark, 1 Strobh. L. 479; Laros v. Com. 84 Pa. 200; Com. v. Mosler, 4 Pa. 264.

[3] Vance v. Upson, 66 Tex. 476; Whitman v. Morey, 63 N. H. 448; Tobin v. Jenkins, 29 Ark. 151; Boughton v. Knight, L. R. 3 Prob. & Div. 64. And see Summers v. Copeland, 125 Ind. 466.

[4] Roberts v. Trawick, 13 Ala. 68; Stubbs v. Houston, 33 Ala. 555; Newcomb v. Newcomb, 96 Ky. 120; Barker v. Comins, 110 Mass. 477.

[5] Hammond v. Dike, 42 Minn. 273; Moore v. Moore, 2 Bradf. 265; Fitzgerald v. Shelton, 95 N. C. 519.

[6] Carpenter v. Hatch, 64 N. H. 573.

[7] Denning v. Butcher, 91 Iowa, 425.

father's estate upon his death, offered for the purpose of showing that the will was unreasonable, as a ground for inferring unsoundness of mind, however, is not a ground for exception.[1] But evidence that a testatrix undertook to devise property not her own is relevant and admissible in a will contest on the issue of want of testamentary capacity and undue influence.[2] And evidence that the testator understood that in order to render his will operative it would be necessary to name all his heirs is competent to explain numerous legacies of $1 each in his will.[3]

A will and the probate thereof are not rendered inadmissible in evidence by the fact that the probate contained an *ex parte* affidavit of one of the witnesses stating that the testator was of sound mind,[4] though the will is admissible without the probate.[5]

§ 3. *Former wills and deeds.*

A former will executed at a time when there was no doubt of the capacity of the testator, containing provisions similar to those of a later will, is competent in connection with other evidence on the contested probate of the latter on the question as to whether the testator's mind was rational and unbiased at the time of the execution of the second will.[6] And the rule is the same whether the will was formally executed or a mere draft.[7] And the contents of the former will may be proved without its production.[8] But a former will, though prepared in accordance with instructions given by the testator, which was not

[1] Nash v. Hunt, 116 Mass. 237.

[2] Re Buckman's Will, 64 Vt. 313.

[3] Whitman v. Morey, 63 N. H. 448.

[4] Summers v. Copeland, 125 Ind. 466.

[5] Curry v. Bratney, 29 Ind. 195.

[6] Tobin v. Jenkins, 29 Ark. 151; Ross v. McQuiston, 45 Iowa, 145; Beaubien v. Cicotte, 12 Mich. 459; Thompson v. Ish, 99 Mo. 160; Muller v. St. Louis Hospital Asso. 73 Mo. 243; Rankin v. Rankin, 61 Mo. 295; Den v. Vancleve, 5 N. J. L. 589; Titlow v. Titlow, 54 Pa. 216, 93 Am. Dec. 691; Irish v. Smith, 8 Serg. & R. 573, 11 Am. Dec. 648; Kerr v. Lunsford, 3 W. Va. 680, 2 L. R. A. 668. And see Fountain v. Brown, 38 Ala. 72; Love v. Johnston, 12 Ired. L. 355; Dodge v. Meech, 1 Hagg. Eccl. Rep. 612; Mynn v. Robinson, 2 Hagg. Eccl. Rep. 169; also, *dicta* in Brown v. Mitchell, 87 Tex. 140.

[7] McConnell v. Wildes, 153 Mass. 487; Thornton v. Thornton, 39 Vt. 122.

[8] Den v. Vancleve, 5 N. J. L. 589.

executed and which does not appear to have been read over to him or its contents made known to or approved by him, is not admissible.[1] So, a previous will making different dispositions of the testator's property is also admissible on behalf of the contestants.[2] But a previous will in which a testator gave directions respecting the renting of a portion of his farm for a burying ground and the erection of a house on it, is not admissible as evidence of insanity to defeat a subsequent will.[3] And refusal to admit a former will in evidence in a will contest where it had been destroyed is not error in the absence of any statement of counsel as to what were the contents of the will and as to whether it had any bearing upon the question of the testator's soundness or unsoundness of mind.[4] And a will in which the testator makes his nephew a residuary legatee, disinheriting his daughter, and a trust deed by him of certain stocks and notes to his former guardian, made for the purpose of carrying the provisions of the will into effect, are too remote and uncertain in character, and open to too many collateral issues, to be admissible as bearing on his mental capacity in an action attacking the validity of his deed.[5] So deeds, articles of incorporation, and other papers to which a testator was a party, made after the date of his will, are competent evidence in a will contest for the purpose of showing the extent of his mental powers at that time.[6] And when at the time of making certain deeds the grantor had mental capacity to contract, and there was no change in her mind for the worse when she afterwards made another deed, the latter being one which if binding would defeat an action to set aside the first, it would be erroneous to charge that it would be no bar to a recovery therein.[7] Nor should the special attention of the jury be called to irregularities in a will unless more importance is attached to that circumstance than to others.[8]

[1] Brown v. Mitchell, 88 Tex. 350.

[2] Hughes v. Hughes, 31 Ala. 519, Overruling Roberts v. Trawick, 13 Ala. 68.

[3] Kachline v. Clark, 4 Whart. 316.

[4] Lowder v. Lowder, 58 Ind. 538.

[5] Hovey v. Hobson, 55 Me. 256.

[6] Morris v. Morton, 14 Ky. L. Rep. 360.

[7] Bowden v. Achor, 95 Ga. 243.

[8] Stokes v. Shippen, 13 Bush, 180.

§ 4. *Declarations and admissions of the party.*

Whether declarations or admissions of a party would have any practical or material probative force on the question of his sanity or insanity is the true guide in determining their admissibility in evidence.[1] And declarations of a person accused of crime, made either before or after the criminal act, may be given in evidence on the question of his sanity or insanity for the purpose of ascertaining the state of his mind.[2] And where acts, conduct, and declarations of the accused are introduced to prove his insanity at the time of the commission of the act, the prosecution in rebuttal is not limited to the explanation or denial thereof, but may offer evidence of other acts, conduct, or declarations tending to show his sanity within the same period.[3] And such evidence is not objectionable as an attack upon character.[4] So, while declarations of a grantor, made subsequent to the execution of his deed, cannot be given in evidence to invalidate it, declarations made near the time of its execution are admissible upon an issue as to whether or not he was insane at the time.[5] And declarations of a testator are admissible in a proceeding to contest his will to show his mental condition at the time of its execution,[6]

[1] French v. State, 93 Wis. 325.

[2] McLean v. State, 16 Ala. 672; State v. Hays, 22 La. Ann. 39; People v. Lake, 1 Park Crim. Rep. 495; United States v. Holmes, 1 Cliff. 98.

[3] United States v. Holmes, 1 Cliff. 110.

[4] United States v. Holmes, 1 Cliff. 111.

[5] Woodcock v. Johnson, 36 Minn. 217; Chess v. Chess, 1 Penr. & W. 32, 21 Am. Dec. 350; Rice v. Rice, 127 Pa. 181; Norwood v. Marrow, 4 Dev. & B. L. 442; Dinges v. Branson, 14 W. Va. 100.

[6] Comstock v. Hadlyme Eccl. Soc. 8 Conn. 254, 20 Am. Dec. 100; Reynolds v. Adams, 90 Ill. 134, 32 Am. Rep. 15; Cockeram v. Cockeram, 17 Ill. App. 604; Todd v. Fenton, 66 Ind. 25; Bates v. Bates, 27 Iowa, 110, 1 Am. Rep. 260; Ross v. McQuiston, 45 Iowa, 145; Mooney v. Olsen, 22 Kan. 69; Jones v. McLellan, 76 Me. 49; Griffith v. Diffenderffer, 50 Md. 466; Harring v. Allen, 25 Mich. 505; Sheehan v. Kearney (Miss.) 21 So. 41, 35 L. R. A. 102; Pratte v. Coffman, 33 Mo. 76; Jones v. Roberts, 37 Mo. App. 163; Boylan v. Meeker, 28 N. J. L. 274; Waterman v. Whitney, 11 N. Y. 157, 62 Am. Dec. 71; Re Clark, 40 Hun, 233; Sisson v. Conger, 1 Thomp. & C. 564; Marx v. McGlynn, 4 Redf. 457, Affirmed 88 N. Y. 357; Wood v. Sawyer, 1 Phill. L. 251; Reel v. Reel, 1 Hawks, 248, 9 Am. Dec. 632; Herster v. Herster, 122 Pa. 239; McTaggart v. Thompson, 14 Pa. 149; Peery v. Peery, 94 Tenn. 328; Robinson v. Hutchinson, 26 Vt. 38, 60 Am. Dec.

or to show that he was laboring under an insane delusion.[1] And admissions and declarations of a donor made both before and after the execution of his deed, tending to show that undue influence was exercised over him to induce him to make it, are admissible to the same extent as if the contest was about the execution of a will,[2] being admissible to show capacity and knowledge of contents, especially where it was prepared by the donee and alleged to have been fraudulently procured.[3]

A party cannot make substantive evidence in his own favor, however, by proving his own declarations out of court under the claim that his story would afford ground for argument that he was insane.[4] Nor can statements or admissions of a person of unsound mind be made the basis of a decree against him.[5] And the testimony of one accused of crime that he was laboring under such a defect of reason as not to know the nature of the act is inadmissible.[6] Declarations and admissions can only be considered on the question of mental capacity.[7] They are not evidence of the facts stated, but are admissible merely as tending to show the operations of the mind,[8] nor to contradict a will or show its revocation,[9] or for the purpose of establishing undue

298; Thompson v. Updegraff, 3 W. Va. 629. And see Sutton v. Sadler, 3 C. B. N. S. 87.

[1] Brace v. Black, 125 Ill. 33.

[2] Dinges v. Branson, 14 W. Va. 100. And see Howell v. Howell, 47 Ga. 492; Rice v. Rice, 127 Pa. 181; Haines v. Hayden, 95 Mich. 332; Johnson v. Culver, 116 Ind. 278.

[3] Howell v. Howell, 47 Ga. 492.

[4] State v. Tatro, 50 Vt. 483. And see Bootle v. Blundell, 19 Ves. Jr. 494.

[5] Hoffman v. Overbey, 137 U. S. 465, 34 L. ed. 754.

[6] State v. Kluseman, 53 Minn. 541.

[7] Turner v. Cook, 36 Ind. 129.

[8] Comstock v. Hadlyme Eccl. Soc. 8 Conn. 254, 20 Am. Dec. 100; Mooney v. Olsen, 22 Kan. 69; Jones v. McLellan, 76 Me. 49; Harring v. Allen, 25 Mich. 505; Pratte v. Coffman, 33 Mo. 76; Jones v. Roberts, 37 Mo. App. 163; Gibson v. Gibson, 24 Mo. 227; Re Lang's Estate, 65 Cal. 19. And see Stewart v. Redditt, 3 Md. 67; May v. Bradlee, 127 Mass. 414; Woodbury v. Obear, 7 Gray, 467; Wurzell v. Beckman, 52 Mich. 478; Fraser v. Jennison, 42 Mich. 206; Rule v. Maupin, 84 Mo. 587; Norwood v. Marrow, 4 Dev. & B. L. 442; Kachline v. Clark, 4 Whart. 316; Crocker v. Chase, 57 Vt. 413.

[9] Reynolds v. Adams, 90 Ill. 134, 32 Am. Rep. 15.

influence exercised upon a testator,[1] unless contemporaneously made,[2] or unless there be proof of other facts and circumstances indicating fraud and circumvention.[3] The admission of such evidence on the question of undue influence, however, depends largely upon the character of the unsoundness attempted to be proved.[4] And it is admissible where the issue is both undue influence and mental incapacity;[5] or where it tends to show weakness of mind operated upon by excessive and undue importunity, even though they were made in the absence of the person affected thereby.[6] And such declarations are not rendered inadmissible by statutes prohibiting a party from giving evidence of conversations with a deceased person relative to any matter in issue between the parties,[7] though they are inadmissible when unaccompanied by evidence of insanity at the time.[8]

So, declarations made by a grantor showing an intent to dispose of his property in the manner in which he afterward disposes of it are admissible in evidence as tending to show capacity at the time of such disposition.[9] And declarations showing a different intent are admissible as tending to raise an inference of incapacity.[10] But a variance between declared intentions to make a gift and a subsequent deed constituting a better bargain does not affect the admissibility of the declarations in evidence in an action

[1] Dennis v. Weeks, 46 Ga. 514; Todd v. Fenton, 66 Ind. 25; Re Goldthorp, 94 Iowa, 336; Harring v. Allen, 25 Mich. 505; Herster v. Herster, 122 Pa. 239; Titlow v. Titlow, 54 Pa. 216, 93 Am. Dec. 691; Peery v. Peery, 94 Tenn. 328; Thompson v. Updegraff, 3 W. Va. 629; Smith v. Fenner, 1 Gall. 170. And see Bundy v. McKnight, 48 Ind. 502.

[2] See Todd v. Fenton, 66 Ind. 25; Waterman v. Whitney, 11 N. Y. 157, 62 Am. Dec. 71; Jackson v. Kniffen, 2 Johns. 31. But see Bates v. Bates, 27 Iowa, 110, 1 Am. Rep. 260.

[3] Herster v. Herster, 122 Pa. 256.

[4] Herster v. Herster, 122 Pa. 239.

[5] Parsons v. Parsons, 66 Iowa, 754; Mooney v. Olsen, 22 Kan. 69.

[6] Rambler v. Tryon, 7 Serg. & R. 90, 10 Am. Dec. 444.

[7] Re Brown's Will, 38 Minn. 112.

[8] Howe v. Howe, 99 Mass. 88; Norwood v. Marrow, 4 Dev. & B. L. 442; Crocker v. Chase, 57 Vt. 413. And see Kachline v. Clark, 4 Whart. 316.

[9] Buckey v. Buckey, 38 W. Va. 168; Muller v. St. Louis Hospital Asso. 5 Mo. App. 390; Howe v. Howe, 99 Mass. 88.

[10] Wilkinson v. Pearson, 23 Pa. 117; Reel v. Reel, 1 Hawks, 248, 9 Am. Dec. 632.

to set the deed aside.[1] So, declarations of a testator as to his intentions with respect to his will are admissible in evidence on the question of testamentary capacity.[2] And the rule is the same whether the declarations are consistent with the dispositions made;[3] or whether they show testamentary intent quite different from that manifested in the will subsequently made.[4] And declarations by a testator appearing to be sane and rational, that he had not been in his right mind for years, are competent as tending to prove insanity.[5] But declarations of intentions diminish in importance as the grade of capacity increases, and have no value at all where the mind is sound.[6] And the exclusion of declarations of a person admitted to be sane is not error.[7] And the time within which declarations or admissions must have been made to be admissible in evidence has been said to be shortly previous or subsequent to the act in question,[8] the admissibility of the declarations, connected with the conduct of the party, depending upon the degree of remoteness with respect to the act in issue.[9] And it has been intimated that they should be near

[1] Rice v. Rice, 127 Pa. 181.

[2] Den v. Vancleve, 5 N. J. L. 589; Re Goldthorp, 94 Iowa, 336; Bever v. Spangler, 93 Iowa, 576; Re Brown's Will, 38 Minn. 112; Re Pinney's Will, 27 Minn. 280; May v. Bradlee, 127 Mass. 414; Thompson v. Ish, 99 Mo. 160; Rule v. Maupin, 84 Mo. 587; Muller v. St. Louis Hospital Asso. 5 Mo. App. 390; Tunison v. Tunison, 4 Bradf. 138.

[3] Den, Stevens, v. Vancleve, 4 Wash. C. C. 262; Hammond v. Dike, 42 Minn. 273; Titlow v. Titlow, 54 Pa. 216, 93 Am. Dec. 691; Brown v. Mitchell, 88 Tex. 350, 36 L. R. A. 64; McMechen v. McMechen, 17 W. Va. 683, 41 Am. Rep. 682; Sutton v. Sadler, 3 C. B. N. S. 87.

[4] Titlow v. Titlow, 54 Pa. 216, 93 Am. Dec. 691; Boylan v. Meeker, 15 N. J. Eq. 310; Waterman v. Whitney, 11 N. Y. 157, 62 Am. Dec. 71; Sisson v. Conger, 1 Thomp. & C. 564; Re Denison's Appeal, 29 Conn. 399; Norris v. Sheppard, 20 Pa. 475.

[5] Ross v. McQuiston, 45 Iowa, 145; Colvin v. Warford, 20 Md. 357.

[6] Tunison v. Tunison, 4 Bradf. 138.

[7] Harden v. Hays, 14 Pa. 91.

[8] Robinson v. Hutchinson, 26 Vt. 38, 60 Am. Dec. 298. And see People v. Hawkins, 109 N. Y. 408.

[9] See Norwood v. Marrow, 4 Dev. & B. L. 442; State v. Vann, 82 N. C. 631; State v. Tilly, 3 Ired. L. 424; McLean v. State, 16 Ala. 672; Waterman v. Whitney, 11 N. Y. 157, 62 Am. Dec. 71.

enough in point of time to be of the *res gestæ*.[1] And declarations made two years after the execution of the will have been held too remote to be admissible as evidence of the testator's mental capacity.[2]

But, upon the other hand, it has been held that they need not be so near the act in question in point of time as to make them part of the *res gestæ*,[3] though they must be when offered to establish fraud.[4] And that the declarations of a grantor are admissible in an action to set aside his deed upon the question of mental capacity where they were made not more than fifteen months before the alleged insanity began nor more than eighteen months before the disputed deed.[5] So, where declarations are given in evidence it is within the discretion of the trial court to admit evidence that the person making them had first consulted with his lawyer.[6] And the rejection of declarations made some time before the act in question is not error where the person making them had not been restricted in his proof and had closed his case without offering them.[7] Nor is it competent to prove declarations made to a physician as to the declarant's condition at a time prior to the declarations.[8]

§ 5. *Declarations and admissions of other interested persons.*

Declarations by a person killed, before the commission of the homicide, that the accused was insane, are not admissible in evidence

[1] State v. Scott, 1 Hawks, 24; Marx v. McGlynn, 4 Redf. 457, Affirmed 88 N. Y. 357; Waterman v. Whitney, 11 N. Y. 157, 62 Am. Dec. 71. And see Rutherford v. Morris, 77 Ill. 397; Hayes v. West, 37 Ind. 21; Quisenberry v. Quisenberry, 14 B. Mon. 481; Fraser v. Jennison, 42 Mich. 206; Cawthorn v. Haynes, 24 Mo. 236; Gibson v. Gibson, 24 Mo. 227; Tingley v. Cowgill, 48 Mo. 291; Spoonemore v. Cables, 66 Mo. 579.

[2] La Bau v. Vanderbilt, 3 Redf. 384; Landis v. Landis, 1 Grant, Cas. 248; Durant v. Ashmore, 2 Rich. L. 184; Wilkinson v. Pearson, 23 Pa. 117. But see Muller v. St. Louis Hospital Asso. 5 Mo. App. 390.

[3] Thompson v. Ish, 99 Mo. 160; Dinges v. Branson, 14 W. Va. 100; Bolling v. State, 54 Ark. 588. And see Ross v. McQuiston, 45 Iowa, 145.

[4] Pratte v. Coffman, 33 Mo. 76.

[5] Rice v. Rice, 127 Pa. 181.

[6] State v. Hansen, 25 Or. 391.

[7] State v. John, 8 Ired. L. 330, 49 Am. Dec. 396.

[8] People v. Hawkins, 109 N. Y. 408.

to show insanity upon a prosecution for the homicide,[1] though they were the dying declarations of the person killed; and it is immaterial on the question of insanity whether they were properly received or not, as they go only to establish the fact of homicide.[2] Nor is an admission of a sister of the person killed, who was shot at the same time and afterwards died, that the defendant could not have been in his right mind, admissible on the issue of his insanity.[3] Nor are acts and declarations of the wife of the accused on the day of the murder.[4] And evidence of declarations of members of the defendant's family with relation to his mental condition are not admissible where the declarants are living and residing within the county.[5] So, declarations of an attorney in fact that his principal was *non compos mentis* at the date of a deed executed by the attorney, and at the time of the execution of the power of attorney, are not admissible in evidence to defeat the deed in behalf of devisees of the principal.[6] But declarations of a son, who had received a conveyance from his father, that his father was incapable of transacting ordinary business, and that he did not consider the deed worth recording, are admissible against him in an action to set aside the deed upon the ground of the father's mental incapacity[7] though those of a father that his son was insane, made upon making a provision for him, are not admissible.[8] With reference to wills, the rule has been laid down generally that statements, declarations, and admissions by a devisee or legatee against his interest, to the effect that the testator was mentally incapable of making a will, are admissible in evidence on a contest of the will in favor of the contestant.[9] And

[1] State v. Spencer, 21 N. J. L. 196.

[2] State v. Welsor, 117 Mo. 570; State v. Pagels, 92 Mo. 300.

[3] Beck v. State, 76 Ga. 452.

[4] Warren v. Com. 37 Pa. 45.

[5] State v. Porter, 34 Iowa, 131.

[6] Bensell v. Chancellor, 5 Whart. 371, 34 Am. Dec. 531.

[7] Boggess v. Boggess, 127 Mo. 305. And see Gee v. Ward, 5 Week. Rep. 579.

[8] Gray v. Obear, 59 Ga. 675.

[9] Wallis v. Luhring, 134 Ind. 447; Milton v. Hunter, 13 Bush, 163; Phelps v. Hartwell, 1 Mass. 71; Armstrong v. Farrar, 8 Mo. 627; Keithley v. Stafford, 126 Ill. 507. And see Ducker v. Whitson, 112 N. C. 44; Dale's Appeal, 57 Conn. 127.

that the declarations and admissions of executors propounding the will, who are also legatees and parties to the record, are admissible on the question of testamentary capacity,[1] as well as those of a contestant in favor of the sanity of the testator,[2] whether made before or after the execution of the will.[3] And that the admissions and declarations of a legatee under a will that she had consulted a physician as to the testator's capacity, and that he would do anything she asked him to, are admissible in a proceeding to contest a will upon the ground of testamentary incapacity and undue influence.[4] But a legatee who has expressed an opinion that the testator had not sufficient capacity to make a will may be properly permitted, on a contested probate of the will, to explain his change of opinion as a result of information with regard to what in law constitutes testamentary capacity.[5] And declarations by a party seeking to sustain a will, as to mental incapacity of the testator, are not admissible unless they relate to the capacity of the testator at about the time the will was made or within a short period thereafter.[6] And statements of the devisee several months before the making of the will in question, as to the incapacity of a testator, are incompetent to show the fact at the time the will was made.[7]

So, statements made by the wife of a testator that he was an old fool and was deranged are not admissible in a will contest as admissions concerning his mental condition when made under circumstances showing that they were the petulant reproaches of an irritable old woman rather than the expression of an opinion;[8] and when declarations against interest are given the declarant may insist upon giving the whole conversation.[9] And the declarations of a party to a will contest, made when he had no interest in the subject, in which he subsequently became interested by

[1] Atkins v. Sanger, 1 Pick. 192; Peeples v. Stevens, 8 Rich. L. 198, 64 Am. Dec. 750; Re Brown's Will, 38 Minn. 112.

[2] Ware v. Ware, 8 Me. 42.

[3] Peeples v. Stevens, 8 Rich. L. 198, 64 Am. Dec. 750.

[4] Horn v. Pullman, 10 Hun, 471.

[5] Dale's Appeal, 57 Conn. 127.

[6] Thompson v. Kyner, 65 Pa. 368.

[7] Hunt v. Hunt, 3 B. Mon. 575.

[8] Sellars v. Sellars, 2 Heisk. 430.

[9] Dale's Appeal, 57 Conn. 127.

the making of a will, cannot be given against him as declarations against interest;[1] nor are declarations admissible to defeat a will when the amount he would receive under it is less than he would take if the testator had died intestate.[2] And the rule would seem to prevail that declarations or admissions of a legatee or devisee as to the mental capacity of the testator are not admissible in a proceeding to contest the validity of the will, where there are other legatees or devisees whose interests may be injuriously affected thereby,[3] where it does not appear that the other legatees were either jointly interested or had conspired with him,[4] whether the declarant is a party to the issue or not.[5] In any event they could only be admitted as against the party making them,[6] though they would be admissible if the whole estate were devised to him.[7] The contrary doctrine making such declarations competent, however, when they relate to the condition of the testator's mind, has some support.[8]

So, declarations by the proponent of a will who is the husband of one of the legatees, that the testator was of unsound mind

[1] Burton v. Scott, 3 Rand. 399; Ware v. Ware, 8 Me. 42.

[2] Titlow v. Titlow, 54 Pa. 216, 93 Am. Dec. 691.

[3] Dale's Appeal, 57 Conn. 127; Shorb v. Brubaker, 94 Ind. 165; Hayes v. Burkam, 67 Ind. 359; Dye v. Young, 55 Iowa, 433; Re Ames, 51 Iowa, 596; Shailer v. Bumstead, 99 Mass. 112; LaBau v. Vanderbilt, 3 Redf. 384; Thompson v. Thompson, 13 Ohio St. 356; Nussear v. Arnold, 13 Serg. & R. 323; Bovard v. Wallace, 4 Serg. & R. 499; Boyd v. Eby, 8 Watts, 66; Dietrich v. Dietrich, 4 Watts, 167, note; Hauberger v. Root, 6 Watts & S. 434; Dotts v. Fetzer, 9 Pa. 88; Clark v. Morrison, 25 Pa. 455; Dillard v. Dillard, 2 Strobh. L. 89; Prather v. McClelland, 76 Tex. 574; Burton v. Scott, 3 Rand. 399; Forney v. Ferrell, 4 W. Va. 729. And see Hunt v. Hunt, 3 B. Mon. 575; Roberts v. Trawick, 13 Ala. 68; Blakey v. Blakey, 33 Ala. 611; Coryell v. Stone, 62 Ind. 307.

[4] La Bau v. Vanderbilt, 3 Redf. 384.

[5] Boyd v. Eby, 8 Watts, 66.

[6] Dale's Appeal, 57 Conn. 127.

[7] Nussear v. Arnold, 13 Serg. & R. 323. And see Ware v. Ware, 8 Me. 42; Boyd v. Eby, 8 Watts, 66; Blakey v. Blakey, 33 Ala. 611; Burton v. Scott, 3 Rand. 399.

[8] See Dennis v. Weekes, 46 Ga. 514; Milton v. Hunter, 13 Bush, 163; Rogers v. Rogers, 2 B. Mon. 324; Beall v. Cunningham, 1 B. Mon. 399; Davis v. Calvert, 5 Gill & J. 269, 25 Am. Dec. 282; Armstrong v. Farrar, 8 Mo. 627; M'Craine v. Clarke, 2 Murph. 317; Peeples v. Stevens, 8 Rich. L. 198, 64 Am. Dec. 750; Brown v. Moore, 6 Yerg. 272.

when he made it, are not admissible in evidence to invalidate it.[1] An admission made by an attesting witness to the will, however, that the testator was not competent at the time the will was executed, and that he signed only to attest the signature, or merely to gratify the testator, is admissible in evidence for the purpose of rebutting the prima facie effect of his attestation.[2] And where a witness testifies in a will contest that the will was duly executed by a competent testator, statements made by him in another action, that the instrument was worthless, are admissible in evidence for the purpose of impeachment.[3]

§ 6. *Letters and private writings.*

A letter written by a person accused of crime prior to its commission is admissible in evidence upon a prosecution therefor to throw light upon the condition of his mind at the time.[4] And the admission of a letter written after his arrest for the purpose of showing his sanity, which was claimed to have been obtained in an illegal manner, is not error where the defense was permitted to introduce evidence with a view of proving the manner in which it was obtained.[5] And where such letters have been destroyed, secondary evidence of their contents may be admitted.[6] So, letters written by a testator either before or after the execution of his will are competent evidence upon the question of his mental capacity and the condition of his mind with reference to the objects of his bounty.[7] And letters showing conclusive evidence of a delusion of a character calculated to influence a testator in the selection of his beneficiaries are admissible as tending to enable the jury to determine what weight ought to be given to the fact that the will in question bears evidence of insanity upon its face while previous wills showed no indication of delusion.[8] An undated and unsigned letter to his executor, found

[1] Walker v. Jones, 23 Ala. 448. And see Coryell v. Stone, 62 Ind. 307; Brewer v. Ferguson, 11 Humph. 565.

[2] Colvin v. Warford, 20 Md. 357; Townshend v. Townshend, 9 Gill, 506.

[3] Beaubien v. Cicotte, 12 Mich. 459; Lewis v. Mason, 109 Mass. 169.

[4] State v. Kring, 64 Mo. 591; Sayres v. Com. 88 Pa. 291.

[5] Langdon v. People, 133 Ill. 382.

[6] State v. Kring, 64 Mo. 591.

[7] Marx v. Glynn, 88 N. Y. 357; Dominick v. Dominick, 20 Abb. N. C. 283.

[8] Vance v. Upson, 66 Tex. 476.

among his papers, however, is not admissible in evidence.[1] Nor is the admission in evidence of letters to nieces proving nothing but affectionate sentiments, and a reply indicating friendly solicitude and nothing more, erroneous, as they could in no manner have influenced the jury.[2] And knowledge of the contents of a will and assent to the distribution contained in it may be established by letters of the testator written before it was made.[3]

So, a contract between a contestant of a will and the testator, and checks, letters, receipts, and other documents wholly or partially in his own handwriting, and his bank account and papers drawn by him in public transactions, and his manner of participating in them within a period which would tend to illustrate the condition of his mind at the time his will was made, are admissible on the question of testamentary capacity.[4] And diaries kept by the testator are also admissible as evidence of the condition of his mind with reference to the objects of his bounty,[5] but not as evidence of the facts stated or to prove fraud or undue influence.[6] And a journal kept by the master of a ship is admissible, in a prosecution against members of the crew for a revolt, to prove his sanity by the style in which it was kept, and not as evidence of any fact stated in it.[7] The contents of a bond executed by a testator, however, are not admissible as evidence of his capacity to comprehend or transact business where it does not appear that he read it or heard it read.[8] Nor is a letter of a testator admissible on the question of his mental capacity to explain his peculiar actions where it is not dated and it does not appear whether it was written at or about the time of such actions or not.[9] And letters by a testator to his brother showing affectionate and brotherly relations are not admissible in connection

[1] Murphree v. Senn, 107 Ala. 424.
[2] Fraser v. Jennison, 42 Mich. 206.
[3] McNinch v. Charles, 2 Rich. L. 229.
[4] Wise v. Foote, 81 Ky. 10.
[5] Marx v. McGlynn, 88 N. Y. 357, Affirming 4 Redf. 255; Irish v. Smith, 8 Serg. & R. 573.
[6] Marx v. McGlynn, 88 N. Y. 357, Affirming 4 Redf. 255.
[7] United States v. Sharp, 1 Pet. C. C. 118.
[8] Re Pinney's Will, 27 Minn. 280.
[9] Clements v. McGinn (Cal.) 33 Pac. 920.

with the fact that he had not made his brother's children objects of his bounty where the letters were written more than twenty-five years before, and the brother had long been dead, and family intercourse had been discontinued.[1] So, letters addressed to the person, found among his papers after death, written in reply to communications from him, are inadmissible as evidence of his mental capacity, unless it is shown that he exercised some act or judgment or understanding with reference to them.[2] But letters passing between the legatees under a will and the heirs who contest it, having reference to the confinement of the testatrix in an insane asylum and to her cure and release, are admissible, not only to show her state of mind toward the parties, but also her mental condition.[3] Letters of a stranger proved to be insane are not admissible in a will contest upon the ground of the testator's insanity for the purpose of showing that insane persons might write rationally.[4] And subsequent papers made by the testator, though admissible,[5] are to be regarded with jealousy, as he is not permitted to prove his own insanity.[6] But a memorandum of facts and suggestions concerning unsettled business made by the testator for the use of his executors, which is substantially correct, is admissible as tending to strengthen the inference arising from a rational will.[7]

§ 7. *Acts and conduct.*

The right to testify to the peculiar acts and conduct of the party alleged to be insane is not limited to expert witnesses and intimate acquaintances.[8] A question as to how another conducted himself in a recent transaction does not call for an opinion as to his sanity, but for a statement as to his conduct and appear-

[1] Fraser v. Jennison, 42 Mich. 206.

[2] Waters v. Waters, 35 Md. 531; Wright v. Doe, Tatham, 7 Ad. & El. 313, 4 Bing. N. C. 489; Morgan v. Boys, cited in 7 Ad. & El. 337; Handley v. Jones, cited in 7 Ad. & El. 337.

[3] Foster v. Dickerson, 64 Vt. 233.

[4] Ware v. Ware, 8 Me. 42.

[5] Wood v. Sawyer, 1 Phill. L. 251.

[6] Bootle v. Blundell, 19 Ves. Jr. 494.

[7] Re Weir's Will, 9 Dana, 434.

[8] Marceau v. Travelers' Ins. Co. 101 Cal. 338.

ance.[1] And the parties to an action in which sanity is in issue are not confined to general evidence as to sanity or insanity, but particular acts of madness may be given.[2] Nor will testimony be rejected as irrelevant and immaterial on the issue of insanity merely because the facts testified to by each witness, taken separately, may not prove sanity or insanity to a sufficient extent to qualify him to express his individual opinion upon the question.[3] Every act of the party and every circumstance which could possibly aid the jury in correctly determining the question are to be admitted.[4] Whether the acts and conduct of a person would have any practical or material probative force on the question of his sanity or insanity is the true guide in determining their admissibility.[5] And evidence merely calculated to arouse prejudice without throwing light on the question of capacity should be excluded.[6] These rules apply to the acts and conduct of the accused in a criminal prosecution, and they are admissible in evidence whether previous or subsequent to the criminal act, as tending to show the state of his mind at the time.[7] And the prosecution need not show unsoundness of mind at the time of performing the acts to enable it to use them as rebutting testimony in reply to evidence on the part of the prisoner of acts and conduct tending to show insanity.[8] And the defendant who interposes insanity as a defense may prove not only irrational and insane acts and conduct, but also facts which may account for such acts and show an adequate cause for the insane conduct,[9] the conduct of the accused being admissible, though not forming a part of the *res gestæ*, whenever it is so connected with or corre-

[1] Re Wax's Estate, 106 Cal. 343.

[2] Clark v. Periam, 2 Atk. 340, *dictum*. And see Hodges v. Scott, 118 Mass. 530; Johnson v. Culver, 116 Ind. 278.

[3] First Nat. Bank v. Wirebach, 106 Pa. 37; McTaggart v. Thompson, 14 Pa. 149.

[4] Van Deusen v. Newcomer, 40 Mich. 90; Re Pinney's Will, 27 Minn. 280; Clark v. Periam, 2 Atk. 337.

[5] French v. State, 93 Wis. 325.

[6] Pierce v. Pierce, 38 Mich. 412.

[7] McLean v. State, 16 Ala. 672; State v. Hays, 22 La. Ann. 39; People v. Lake, 1 Park. Crim. Rep. 495; United States v. Holmes, 1 Cliff. 98.

[8] United States v. Holmes, 1 Cliff. 98.

[9] People v. Wood, 126 N. Y. 249.

sponds with evidence of disordered or weakened mental condition preceding the offense as to strengthen the inference of continuance and carry it by the time to which the inquiry relates, or whenever it is of such a character as to itself indicate unsoundness of mind at the time of the act in question.[1]

Thus, an odd collection of various articles of no value whatever, even as curiosities, which had been made from time to time by a person accused of murder and preserved with a view of starting a museum, is admissible in a prosecution therefor under the defense of insanity.[2] And evidence that a defendant in a criminal prosecution was insane is relevant and admissible as tending to explain his absence during a part of his trial from which, if unexplained, hurtful inferences might be drawn.[3] But the acts and conduct of the accused to be admissible must have been offered with the view of proving insanity as an excuse or defense,[4] and they are not admissible for the purpose of showing his disposition,[5] or for the purpose of showing intent and deliberation and premeditation, thus affecting the degree of the crime.[6] Nor is the mere fact that the accused was different from other people in his manner of living or acting or speaking or eating admissible upon the question of his insanity.[7] And the rejection of evidence that the accused ate with a hearty appetite, slept soundly and quietly, and evidenced no remorse or sense of guilt while in jail subsequent to the commission of the crime, is not error.[8]

So, evidence in an action involving the validity of certain deeds in which the grantor's sanity was at issue that he remembered the transaction several months afterwards, and understood what he had done, giving reasons therefor, expressing no regret or dissent, is admissible as tending to show sanity and ratification.[9] And evidence that a widow upon the death of her husband took into her house to live with her a man who had abandoned

[1] Bolling v. State, 54 Ark. 588.
[2] State v. West, 1 Houst. Crim. Rep. 371.
[3] State v. Peacock, 50 N. J. L. 34.
[4] Sindram v. People, 88 N. Y. 196, Affirming 1 N. Y. Crim. Rep. 448.
[5] State v. Welsor, 117 Mo. 570.
[6] Sindram v. People, 88 N. Y. 196, Affirming 1 N. Y. Crim. Rep. 448.
[7] Goodwin v. State, 96 Ind. 550.
[8] Com. v. Pomeroy, 117 Mass. 143.
[9] Howe v. Howe, 99 Mass. 88.

his own family, and of their living together for several years as husband and wife, is admissible on an application for the appointment of a conservator for her upon the ground that by reason of her debauched habits she had become incapable of taking care of herself and managing her property.[1] So, the rule admitting the acts and conduct of a party as evidence on the ground of mental capacity applies to those of the testator, whether made before, at the time of, or after, the making of the will.[2] And it is competent to show on the question of testamentary capacity in connection with other evidence that the testator was erratic, eccentric, rambling, and disconnected in conversation, flighty and unsettled and excitable,[3] or that he made improvident bargains.[4] And evidence that a testator would look at a visitor with a vacant stare, and would only answer after being told who he was, and that his countenance and appearance indicated foolishness, is admissible on the question of his capacity to make a will.[5] So, the fact that before a will was made the testator had conveyed away some of the property which he attempted to dispose of is competent.[6] And the fact that a testator made mortgages and transfers of property and afterwards forgot it is admissible upon the issue of sanity and undue influence by the person to whom the transfers were made.[7] And a transfer of property by the testator for the purpose of better enabling him to contest a previous contract is admissible, and so is the fact that he gave a mortgage for more than was due.[8] But the mere fact that the testator was so irritable and abusive to his father that the doctors forbade his coming into the room is not admissible as bearing upon his mental condition a few hours later when he made his will.[9] Nor is the fact that a testator while away from home with one of

[1] Wickwire's Appeal, 30 Conn. 86.

[2] Boylan v. Meeker, 28 N. J. L. 274. And see Haines v. Hayden, 95 Mich. 332.

[3] Prentis v. Bates, 93 Mich. 234, 17 L. R. A. 494. And see Watson v. Anderson, 11 Ala. 43.

[4] Re Carmichael, 36 Ala. 514.

[5] Irish v. Smith, 8 Serg. & R. 573, 11 Am. Dec. 648.

[6] Fountain v. Brown, 38 Ala. 72.

[7] Lewis v. Mason, 109 Mass. 169.

[8] Stubbs v. Houston, 33 Ala. 555.

[9] Re Blood's Will, 62 Vt. 359.

his sons, wanted to stop at another man's house to see his daughter.[1] And the exclusion of a statement of a witness that the testator transacted no business, unless selling articles that did not belong to him could be called transacting business, is not error.[2]

So, evidence that the acts, conduct, and habits of a person whose sanity is in question were changed and unnatural and different from what they had previously been is admissible as tending to show insanity,[3] or the existence of an insane delusion.[4] And the mere fact that a testator did not keep his buildings in as good repair in the latter part of his life as previously is not admissible for the purpose of showing testamentary incapacity.[5] The question whether there was any apparent change in a man's intelligence or understanding, or want of coherency in his remarks, is matter not of opinion, but of fact, as to which any witness who has had opportunity to observe him may testify.[6]

Where evidence of acts and conduct of a person alleged to be insane have been given to prove his insanity the other side is not limited to an explanation or denial of the particular acts or conduct, but may offer evidence of other acts or conduct tending to show that he was sane within the same period.[7] Thus, where evidence has been introduced on the part of the defendant in a criminal prosecution for the purpose of proving his insanity, which searched the history of his whole life down to the time of the act charged, it is competent to show in rebuttal that the ground on which the inference of insanity was based did not exist, and to do this by exhibiting acts and conduct of the defendant, contemporaneous with the history produced, which tend to disprove the existence of such grounds.[8] And evidence of acts indicating insanity at the time of the commission of a criminal act may be met by evidence that the accused was intoxi-

[1] Rice v. Rice, 53 Mich. 432.

[2] Re Blood's Will, 62 Vt. 359.

[3] Watson v. Anderson, 11 Ala. 43; Conely v. McDonald, 40 Mich. 150; Bitner v. Bitner, 65 Pa. 347; Fairchild v. Bascomb, 35 Vt. 398.

[4] Haines v. Hayden, 95 Mich. 332.

[5] Hamilton v. Hamilton, 10 R. I. 538.

[6] Barker v. Comins, 110 Mass. 477.

[7] United States v. Holmes, 1 Cliff. 98; Hall v. State, 31 Tex. Crim. Rep. 565.

[8] United States v. Guiteau, 1 Mackey, 498.

cated on that day, to rebut the inferences arising from his acts.[1] So, preparations made by a party committing a murder, and subsequent conversations indicating that he understood what he had been doing, may be considered on the question of his sanity as well as that of premeditation.[2] And evidence that a person accused of murder committed incest with his daughter is relevant and material where the defense claimed that he became insane from fear that the person killed was trying to debauch her.[3]

So, the conduct of a prisoner as detailed by an officer who looked through a hole prepared in the wall so that he might observe him is competent and material on the issue whether the sanity claimed was real or feigned.[4] And the accused may properly be asked why he pretended insanity.[5] Nor is evidence by a witness, that just after the commission of the offense he asked him the amount of a payment he had made, to which he answered correctly, as he found by subsequent examination of his book, subject to the objection that the book should have been produced, the object not being to prove the account, but the fact that the statement agreed with the book.[6] So, where evidence of strangeness of conduct toward a particular person has been introduced by a contestant in a will contest to support an allegation of partial insanity the propounders may show similar conduct toward other persons.[7] And evidence of ill treatment of a testatrix by her husband, and of his conduct, reputation, and character with reference to other women so far as they were known to her, are admissible in evidence in a will contest in which it was alleged that she was possessed of the insane delusion that he held improper relations with other women.[8]

§ 8. *Surrounding circumstances.*

A very broad inquiry is permitted, on the question of sanity or insanity, into the whole chain of circumstances attending the

[1] People v. Miles, 143 N. Y. 383.
[2] Cole's Trial, 7 Abb. Pr. N. S. 321.
[3] People v. Lane, 101 Cal. 513.
[4] M'Kee v. People, 36 N. Y. 113.
[5] State v. Pritchett, 106 N. C. 667.
[6] State v. Hoyt, 47 Conn. 518, 36 Am. Rep. 89.
[7] Wood v. Sawyer, Phill. L. 251.
[8] Foster v. Dickerson, 64 Vt. 233.

act in question, it being deemed to embrace all the important preliminaries.[1] And anything which tends to show the person's mental condition and the annoyance to which he was subject and his susceptibility to the influence of those around him is admissible in evidence.[2] Thus, in determining whether the case is one of real or pretended insanity in a criminal prosecution the jury should take into consideration the person's circumstances in life and the opportunity he has had of learning the real symptoms.[3] And evidence that the accused, in a prosecution for conveying real estate without informing the grantee of encumbrances thereon, had met with a large loss of property just before the conveyance, is admissible where there is evidence of advanced age and loss of mind and memory.[4] But the exclusion of evidence as to what a person accused of killing his wife said about his separation from her, offered to show that the separation was the uppermost topic on his mind, is not error where the witnesses had already testified that the matter of the separation was the principal topic of his conversation.[5] So, evidence in a prosecution for homicide of information given to the accused of his wife's misconduct with the person killed is admissible to show that he committed the murder in a state of frenzy only when the information was given so near the time of the commission of the crime that there was not sufficient time for the passion it would naturally excite to subside.[6] And where it appears that the wife confessed to the accused that she had committed adultery with the deceased, and that the confession was followed by great anger and mental depression on his part, evidence that she was seen entering a disorderly house with him is not admissible, as it was her statement which is alleged to have deprived him of reason, and not the truth thereof.[7] So, a person accused of murdering a married woman, who testifies that he had been intimate with her

[1] Beaubien v. Cicotte, 12 Mich. 459; Tobin v. Jenkins, 29 Ark. 151; Boughton v. Knight, L. R. 3 Prob. & Div. 64.

[2] Reynolds v. Adams, 90 Ill. 134, 32 Am. Rep. 15.

[3] People v. Lake, 2 Park. Crim. Rep. 215.

[4] Com. v. Brayman, 136 Mass. 438.

[5] State v. Brooks, 4 Wash. 328.

[6] Sanchez v. People, 22 N. Y. 147. And see Sawyer v. State, 35 Ind. 80.

[7] People v. Hurtado, 63 Cal. 288.

and killed her in a passion of jealousy amounting to insanity on her refusal to longer associate with him, may be asked on cross-examination as to whether or not her husband had forbidden him to further associate with her.[1] And where it is claimed that the accused committed the murder while insane, and that the insanity was caused by the discovery of improper relations between the person killed and his wife, evidence that a few months previous to their marriage he had sought to make her a public character for purposes of gain is admissible.[2]

So, evidence in an action upon contract in which insanity is alleged as a defense that the plaintiff took a mortgage as security for certain responsibilities out of which the contract originated, and that while sane he received from the avails of the mortgage a sum more than sufficient to indemnify him for the contract, is admissible, not to ratify or confirm the contract, but as tending to prove by the recognition of it that he was of sound mind at the time.[3] And proof may be given in an action to recover for property sold in which the vendee introduced testimony as to the consideration paid in connection with evidence of the vendor's incapacity and the defendant's knowledge of it, that the value of the property was greater than the price given.[4] But evidence as to the actual value of property in such a case is competent only when offered to show that the price paid was so exorbitant as to be inconsistent with good faith upon the part of the purchaser.[5] And evidence in an action upon contract made with an alleged lunatic that when he signed it he was security for the other party in a large amount, and that the other party had no means of credit, is inadmissible.[6] Nor can a suspicion as to the character of a conveyance by a son to his father, that might be engendered by failure to produce the father as a witness in defense of the conveyance, be used as evidence that the conveyance was fraudulent where the father's mind was so impaired that no reliance could be placed upon his testimony.[7]

[1] Greenley v. State, 60 Ind. 141.
[2] State v. Bryant, 93 Mo. 273.
[3] Grant v. Thompson, 4 Conn. 203, 10 Am. Dec. 119.
[4] Henry v. Fine, 23 Ark. 417.
[5] Cavender v. Waddingham, 5 Mo. App. 487.
[6] Noel v. Karper, 53 Pa. 97.
Woodhull v. Whittle, 63 Mich. 575.

So, the character as a business man of one to whom a testator gave power of attorney to manage his business, and his pecuniary condition, are admissible in evidence in a will contest as bearing upon the capacity of the testator to make a will.[1] And the financial condition of one who contests his father's will, in which he was given a nominal bequest only, may be shown as bearing upon the question of reasonableness.[2] And evidence as to the amount, situation, etc., of the testator's property is admissible as circumstances bearing on his mental condition.[3] But the fact that a testator had derived a large property from inheritance, and died poor, is not admissible to show unsoundness of mind.[4] Nor is the fact that the executor, who was the father of the legatee, who was a stranger, was a wealthy man, relevant on the issue of testamentary capacity.[5] And the rule which permits evidence as to the pecuniary condition, means, and ability of the beneficiaries in a will, and those who might have been benefited, with the view of determining whether the testator appreciated his relation to them and exhibited a capable and disposing mind, has no application in case of a gift accompanied by delivery.[6]

So, conversations had in the presence of a testator regarding the condition of his mind, which would naturally call for some response from him, during which he remained silent, are admissible, it being left to the jury whether or not he heard them.[7] And it is competent to show that a testator who had been confined in an asylum was sane but remained voluntarily.[8] And the fact that the proponent of a will secretly managed the estate of the testator, and his petition for the appointment of a guardian for him, are relevant and admissible.[9] So, evidence of the bad character of an executor appointed in a will, in connection with facts and circumstances justifying the inference that the testator

[1] Frary v. Gusha, 59 Vt. 257.
[2] Sim v. Russell, 90 Iowa, 656.
[3] Kenworthy v. Williams, 5 Ind. 375.
[4] Hall v. Hall, 17 Pick. 373.
[5] Murphree v. Senn, 107 Ala. 424.
[6] Crum v. Thornley, 47 Ill. 192.
[7] Meeker v. Meeker, 74 Iowa, 352.
[8] Martin v. Johnston, 1 Fost. & F. 122
[9] Vance v. Upson, 66 Tex. 476.

knew of it, is admissible upon the question of his mental capacity.[1] And oral evidence as to the fact that the testator did not hold an equitable title to land devised by him may be given as tending to show that his memory was good and his judgment as to the best mode of preventing subsequent litigation was sound.[2] And one who makes a bond for the conveyance of land to the testator after refusal to do so may testify that he understood that the bond was intended to secure the land for the testator until he should recover.[3] So, a message sent to a physician and acted upon is admissible in evidence as a part of the *res gestæ*, where it appears that the instructions for the execution of his will contemplated that a physician should be sent for.[4] And evidence that women alleged to have combined to impose upon a testator, and who kept him in a state of intoxication, and represented each other as persons of good character, and urged him to make a will in their favor to the exclusion of his relatives, were women of bad character, is admissible.[5]

So, evidence that a woman whom the testator claims to be his daughter, whom he took into his household, resembled one of his daughters and was in fact his illegitimate daughter, is admissible on the question of his insanity.[6] And evidence tending to show the want of any real or apparent cause for an alleged delusion is competent and material.[7] And the fact that a white testator believed that a child of his wife bearing the peculiar distinctive marks of a negro was his child is admissible in evidence for the purpose of showing a delusion on that subject.[8] And a son-in-law of a testator with whom he had frequently charged his wife with improper intimacies may be permitted to deny such intimacies for the purpose of showing that the testator's charge had no foundation in fact.[9] So, evidence that statements in a will, that the testator had advanced designated sums to persons named,

[1] McGinnis v. Kempsey, 27 Mich. 363.
[2] Brownfield v. Brownfield, 43 Ill. 147.
[3] Baxter v. Abbott, 7 Gray, 71.
[4] Beaubien v. Cicotte, 12 Mich. 459.
[5] Nussear v. Arnold, 13 Serg. & R. 323.
[6] Johnson v. Armstrong, 97 Ala. 731.
[7] Mullins v. Cottrell, 41 Miss. 291; Mills's Appeal, 44 Conn. 484.
[8] Florey v. Florey, 24 Ala. 241.
[9] Burkhart v. Gladish, 123 Ind. 337.

were erroneous, is competent for the purpose of showing the mental condition of the testator, but not to contradict the will.[1] But evidence of the good character of the contestants, and of their father, who was the testator's son, is not admissible in a will contest on the ground of the testator's incapacity.[2] Nor is the sanity of a testator to be determined by his religious creed unless it is so absurd as to afford evidence of unsoundness of mind, though it is proper to admit testimony as to it for the purpose of showing his state of mind.[3] And evidence that a witness had been forbidden by the contestant to go to see the testatrix is not admissible as tending to show testamentary incapacity or undue influence.[4] Nor is evidence that other persons while inmates of an insane asylum had given intelligent depositions and been permitted to testify in court admissible where the testatrix was confined in an asylum.[5] Nor is a refusal to permit the contestant to prove what certain property was worth reversible error, where it is claimed and denied that he had sold it for less than it was worth.[6] And the exclusion of a question put to the witness in a will contest, who had drawn the will and had testified that the testator drew his attention to a memorandum respecting a land trade, as to what, if any, recollection he had upon the subject himself, is not error.[7] So, where the relator in an inquisition of lunacy charges delusion the alleged lunatic has the right to show that the accusations made by him were founded on fact.[8] And evidence that the alleged incompetent was very much cast down and thought his children were not using him right and were wasting his property, and wanted somebody to take care of it, is admissible as tending to show that he was subject to delusions.[9] But evidence as to whether or not the alleged lunatic was controlled by his brother, and was going down hill generally, is not

[1] Lamb v. Lamb, 105 Ind. 456.
[2] Tudor v. Tudor, 17 B. Mon. 383.
[3] Mullins v. Cottrell, 41 Miss. 291.
[4] Eckert v. Flowry, 43 Pa. 46.
[5] Foster v. Dickerson, 64 Vt. 233.
[6] Kerr v. Lunsford, 31 W. Va. 680, 2 L. R. A. 668.
[7] McGinnis v. Kempsey, 27 Mich. 363.
[8] Com., Haskell, v. Haskell, 2 Brewst. 491.
[9] Smith v. Hickenbottom, 57 Iowa, 733.

admissible.[1] So, the fact that a witness bore ill-will toward a person alleged to be insane at a time when he testified in a proceeding to test her sanity is not competent evidence in an action by the witness against him for slander in charging him with perjury committed while testifying.[2] And statements by a witness that a wife treated her husband as a parent would a child is inadmissible to prove the insanity of the husband, being a mere expression of opinion.[3]

§ 9. *Relationship between the parties interested.*

The relationship of the parties concerned is admissible in evidence in a criminal prosecution on the subject of the mental condition of the person accused of the crime. Thus, in determining whether a forgery has been committed it is proper to consider the relationship of the parties who profit or suffer by it, in connection with their mental condition and their surrounding circumstances.[4] And evidence in a prosecution for homicide that the accused believed that the person he killed had maintained improper relations with his wife, and statements to that effect made by her, are admissible, not only on the question of premeditation, but as interpreting his conduct and throwing light upon his state of mind, though evidence as to the truth of such belief would not be competent.[5] So, evidence that, shortly before the murder, the wife of the accused told him that her father had stolen his potatoes and had criminally assaulted her, is admissible as tending to show what effect the communication had upon his mind at the time of the commission of the act, where evidence had been previously given that he received a head injury and as to its effect upon his brain.[6] And expressions of hostile feeling toward the accused, made by the person killed, are admissible where it is claimed that the crime was committed under an insane delusion that the deceased and others were engaged in a conspiracy against him, though they were not shown to have been

[1] Re Carmichael, 36 Ala. 514.
[2] Hutts v. Hutts, 62 Ind. 214.
[3] Waters v. Waters, 35 Md. 531.
[4] Crawford v. Hoeft, 58 Mich. 1.
[5] Cole's Trial, 7 Abb. Pr. N. S. 321.
[6] People v. Wood, 126 N. Y. 249.

made in his presence or to have come to his knowledge.[1] Evidence in a prosecution of a person accused of killing his wife and her paramour, however, of acts of infidelity on her part not known to him, are inadmissible.[2] Nor is evidence admissible that a person accused of killing his wife had said to the witnesses from time to time before the homicide that he was greatly attached to her.[3]

So, evidence tending to show the relationship existing between a testator and the natural objects of his bounty is admissible on an issue of testamentary capacity or undue influence.[4] And hostility and aversion to those who are bound to the testator by the ties of kindred are admissible on the question of insanity, not alone because of the existence of the hostility, but because if without cause it would tend to show delusion.[5] And the fact that a difficulty existed between a testator and his heirs is admissible as tending to show the state of his feelings though the particulars of the difficulty are incompetent.[6] So, evidence of an unkind expression concerning a testatrix, used by one of her sisters after the making of her will, is admissible where the evidence tends to show that the testatrix had at all times treated her with kindness.[7] Though evidence as to improper conduct upon the part of a testator, or that one of the devisees had attempted to cast shame and disgrace upon his memory, is irrelevant.[8] So, evidence that a testator's son was industrious and had no vicious habits is admissible where evidence had been given showing that the testator held him in disesteem as tending to show that it was the result of some unnatural condition or influence.[9] And evidence of the general good character and conduct of the wife of the testator's son is admissible on the question of imbecility and

[1] Com. v. Wilson, 1 Gray, 339.

[2] People v. Osmond, 138 N. Y. 80.

[3] State v. Swift, 57 Conn. 496.

[4] Staser v. Hogan, 120 Ind. 207; Sutton v. Sutton, 5 Harr. (Del.) 459; Spratt v. Spratt, 76 Mich. 384; Crocker v. Chase, 57 Vt. 413.

[5] Turner v. Rusk, 53 Md. 65; Brown v. Ward, 53 Md. 376, 36 Am. Rep. 422.

[6] Carter v. Dixon, 69 Ga. 82.

[7] Dunham's Appeal, 27 Conn. 192.

[8] Carpenter v. Calvert, 83 Ill. 62.

[9] Frary v. Gusha, 59 Vt. 257.

fraud, where the testator had disinherited his son on account of her supposed extravagance;[1] though evidence that the reputation of a wife of a testator, whom he had recently married, was not good, is inadmissible.[2] So, evidence of an affectionate relation between a father and son is admissible as tending to show that the subsequent exclusion of the son's son from sharing in the grandfather's bounty was unnatural and the result of mental decay.[3] And intemperate habits of nephews of a testatrix may be proved on an issue of testamentary incapacity and undue influence as tending to show her feelings towards them and to explain why she left them nominal legacies.[4] And the same rule applies to evidence of the intemperate habits of a brother of the testatrix.[5]

So, evidence as to the extent of the testatrix's estate is admissible.[6] And so is evidence of the pecuniary condition of the persons who are or might be beneficiaries under the will.[7] And evidence that the testatrix had brothers and sisters who were poor for whom she cherished feelings of affection and of whose poverty she was aware is admissible on the issue of testamentary capacity with reference to the question as to what would be a natural and reasonable disposition of her property.[8]

So, evidence that a testator had received the larger portion of his father's estate is admissible where his declarations to that effect and that he intended to return a part of it by his will had been received.[9] But evidence of the amount of property possessed by a woman when she married is not admissible in a proceeding to contest the will of her husband upon the ground of unsoundness of mind.[10] So, the fact that the beneficiary under a former will, who was omitted in a subsequent one, had nursed

[1] Dietrick v. Dietrick, 5 Serg. & R. 207.
[2] Thomas v. Stump, 62 Mo. 275.
[3] Bost v. Bost, 87 N. C. 477.
[4] Whitman v. Morey, 63 N. H. 448.
[5] Fairchild v. Bascomb, 35 Vt. 398.
[6] Spratt v. Spratt, 76 Mich. 384.
[7] Stubbs v. Houston, 33 Ala. 555; Sutton v. Sutton, 5 Harr. (Del.) 459; Crocker v. Chase, 57 Vt. 413.
[8] Fairchild v. Bascomb, 35 Vt. 398.
[9] McMechen v. McMechen, 17 W. Va. 683, 41 Am. Rep. 682.
[10] Willett v. Porter, 42 Ind. 250.

the family of the testator in sickness, is admissible on a contest of the subsequent will in connection with evidence that he had often expressed gratitude and his intention to provide for her for the purpose of showing the improbability that he would have excluded her if not influenced by delusion.[1] And evidence as to the amount and quality of the labor performed for a testator by his children is admissible as tending to throw light upon his mental condition;[2] but would not be so where the labor was performed twenty-five years before.[3] Evidence in a will contest that the testator's widow in his lifetime and after the will was made filed a petition for divorce, however, which was pending at his death, is inadmissible.[4] Nor is evidence admissible that the testator sold lumber as the agent of his son-in-law, and the purchaser became embarassed, and the son-in-law suffered a loss greater in amount than any advancements he had received from his father-in-law, on the theory that the advancement would offset the loss and that there was no reason for giving his wife a smaller share than the other heirs.[5] So, a witness in a will contest in which mental imbecility is alleged, who is called to impeach the will, may be asked on cross-examination whether he had ever expected a devise under it.[6] And the petitioner in an inquisition may be asked if he had not offered to drop the matter if paid a certain sum.[7]

§ 10. *Physical and mental condition.*

Independently of any question of sanity or insanity the defendant in a criminal case has the right to have his general physical as well as his mental condition at the time of the commission of the act explained to the jury.[8] And the character and quality of his mind as to whether it was weak or strong is a material fact

[1] Vance v. Upson, 66 Tex. 476.

[2] Burkhart v. Gladish, 123 Ind. 337. And see Canfield v. Fairbanks, 63 Barb. 462.

[3] Maddox v. Maddox, 114 Mo. 35.

[4] Willett v. Porter, 42 Ind. 250.

[5] Stokes v. Shippen, 13 Bush, 180.

[6] Irish v. Smith, 8 Serg. & R. 573, 11 Am. Dec. 643.

[7] Re Mason, 60 Hun, 46.

[8] Sage v. State, 91 Ind. 141.

where the defense is insanity.[1] Everything relating to the physical and mental history of a party accused of crime is relevant on the question of his sanity.[2] Thus, evidence that the accused had been a sleep walker and had frequently seemed to be frightened when aroused from sleep, and attempted violence to those who aroused him as if resisting an assault, and seemed to be unconscious for some minutes, is admissible in a prosecution for homicide in having killed another who had awakened him suddenly out of a sound sleep.[3] So, where the defendant in a prosecution for homicide who interposes epileptic insanity as a defense testifies in his own behalf to his own insanity, the court may direct the attention of the jury without comment to his appearance and conduct as facts for their consideration with the other testimony.[4] And the same may be done in a prosecution for assault and battery which were alleged to have caused insanity, which insanity is claimed to have been a pretense.[5] But a trial will not be stopped on an application made during its continuance to have a party whose sanity is in question put in charge of a physician for the purpose of an examination as to his mental condition, in the absence of an offer to show that his condition was then substantially the same as at the time of the act in question.[6] And evidence in a trial for larceny that about three years prior to the alleged offense, and also since the accused had been in jail, he had been subject to epileptic fits which had weakened his mind and would tend to account for contradictory statements made by him about the possession of the stolen money, is not admissible unless followed by proof that such fits rendered him irresponsible for his acts.[7] So, evidence on a trial for a criminal act in which it appeared that the accused was addicted to the habitual and excessive use of opium, and that at the time of the alleged commission of the offense he had been deprived of his customary supply, and as to the effect such deprivation would have upon his mental con-

[1] People v. Worthington, 105 Cal. 166.
[2] Guiteau's Case, 10 Fed. Rep. 161. And see Martin v. Baker, 135 Mo. 495.
[3] Fain v. Com. 78 Ky. 183, 39 Am. Rep. 213.
[4] Com. v. Buccieri, 153 Pa. 535.
[5] Spear v. Sweeney, 88 Wis. 545.
[6] Hull v. Louth, 109 Ind. 315, 58 Am. Rep. 405.
[7] Gross v. State, 62 Md. 179.

dition, is admissible as tending to show whether he was in such a mental condition as to be able to commit it.[1] And evidence by neighbors of the accused that they had never seen him have an epileptic fit, but had seen him drunk, is admissible as tending to show that stupor which he attributed to epilepsy was really due to drink.[2]

So, where there is evidence tending to show head injury and a diseased condition of the brain in a prosecution for homicide, and that a communication was made to the accused which caused him to become insane, its competency is not affected by the fact that the act was committed deliberately.[3] But evidence as to the temperament and disposition of the accused is not admissible where it is intended not to show insanity or an insane impulse which destroyed his free agency, but only to show that he was of an excitable temperament, and that for the moment he lost his self-government.[4] And evidence of peculiarity, eccentricity, nervousness, excitability, or inordinate passion is not admissible to show insanity or anything from which insanity can be inferred.[5] Nor can the mother of a person accused of homicide who interposes insanity as a defense tell what effect fits which she testifies he had when two years old had on him, or whether they rendered him unconscious or not.[6]

So, the age of a person whose mental capacity to make and deliver a deed is in question, as well as his health, his mode of life, his manners and conversation and his acts and general conduct both before and after the execution thereof, are legitimate and proper for consideration by the jury.[7] And evidence showing the character and progress of the decay of the mental faculties of the maker of a deed and bill of sale from the time they were made until his death is admissible in an action to set them aside on the ground of imbecility and sinister influences.[8] So, evidence

[1] Rogers v. State, 33 Ind. 543.
[2] Com. v. Buccieri, 153 Pa. 535.
[3] People v. Wood, 126 N. Y. 249.
[4] Jacobs v. Com. 121 Pa. 586.
[5] Com. v. Cleary, 148 Pa. 26; Sindram v. People, 1 N. Y. Crim. Rep. 448; Affirmed 88 N. Y. 196.
[6] State v. Hockett, 70 Iowa, 442.
[7] Doe, Guest, v. Beeson, 2 Houst. (Del.) 246.
[8] Hendrix v. Money, 1 Bush, 306.

in a will contest in which testamentary incapacity is alleged of the testatrix's physical condition is admissible, as her mental condition might be affected by it.[1] And the age and physical and mental condition of the testator are admissible for consideration in determining his testamentary capacity.[2] And everything occurring at the time of the execution of the will, including the testator's mental and physical condition, may be properly brought out on cross-examination.[3] Thus, evidence tending to show failure of the testator's memory is admissible as bearing upon the question of his intellectual condition and capacity.[4] And so is evidence that a short time before making the will he was insensible and unconscious of what was going on around him, and did not appear to know an intimate acquaintance, and that efforts to converse with him were ineffectual, such evidence not being a mere matter of opinion but a matter of fact combining many minute particulars.[5] And evidence that the testator had difficulty in stating the names of slaves he wished to donate, and that his principal beneficiary assisted him in ascertaining them, and that he was asked when writing his will if he could recollect what dispositions he had made and whether he was capable of dictating the different dispositions without assistance, is admissible.[6] So, the plaintiff, in an action brought to contest the validity of his father's will upon the theory that the testator's faculties had been impaired by long-continued illness to such an extent as to incapacitate him, may be asked as to his father's health for some years before he died, and especially at about the time of making the will.[7] And a witness as to the insanity of a testatrix may be asked on cross-examination whether the testatrix did not attend a certain banquet as it might be an important fact if true that she was able to attend.[8] And the question whether the eyesight of a testator was good enough to have enabled him to recognize the witness when near

[1] Whitman v. Morey, 63 N. H. 448; Sutton v. Sutton, 5 Harr. (Del.) 459.
[2] Sutton v. Sutton, 5 Harr. (Del.) 459.
[3] Egbert v. Egbert, 78 Pa. 326.
[4] Fountain v. Brown, 38 Ala. 72.
[5] Halley v. Webster, 21 Me. 461.
[6] Aubert v. Aubert, 6 La. Ann. 104.
[7] Sim v. Russell, 90 Iowa, 656.
[8] Prentis v. Bates, 93 Mich. 234, 17 L. R. A. 494.

him if his mind had been right may be asked.[1] So, evidence showing a knowledge on the part of the executor and proponent of a will, who derived a benefit thereunder, of the weak state of the testator's mind, is admissible as evidence in chief where there is evidence that he exercised an influence to have a will made.[2] And infirmity of mind of a party who had been insane is admissible as tending to show that the disorder was not entirely rooted out.[3] But where positive evidence of a testatrix's incapacity has been given, and it is shown that she had a paralytic attack shortly before the execution of the will, evidence that in nine cases out of ten paralysis does not produce any effect on the mind is incompetent.[4] And where the testator is shown to have had three strokes of paralysis, one before making his will and the second a short time afterwards, and the third resulting in his death, evidence that the same disease had affected his ancestors and blood relatives is properly excluded, as it does not show the effect of the malady upon him.[5] Nor is exclusion of evidence of the mental and moral condition of a testatrix, who was seventy-eight years old when her will was executed, fifteen years after making the will when she was affected with paralysis, and of evidence of her bodily and mental condition at subsequent periods until her death at the age of ninety-one, offered to prove that she was weak in body and mind when she executed it, sufficient ground of exception.[6] And the fact that the ordinary effect of morphine is to weaken the power of the will is immaterial in an action to set aside a will on the ground of undue influence where the evidence shows that there was in fact no weakening of the will power and no effort to control the testator.[7]

§ 11. *Hereditary insanity.*

Inquiry into the mental condition of the immediate family, ancestors, and relatives of the person whose sanity is in question

[1] Irish v. Smith, 8 Serg. & R. 573.
[2] Dennis v. Weekes, 46 Ga. 514, *dictum*.
[3] Attorney General v. Parnther, 3 Bro. Ch. 441.
[4] Landis v. Landis, 1 Grant, Cas. 248.
[5] Meeker v. Meeker, 75 Ill. 260.
[6] Shailer v. Bumstead, 99 Mass. 112.
[7] Bush v. Lisle, 89 Ky. 393.

is permissible,[1] after it has been established that the disease of insanity is often hereditary in form.[2] This rule has been applied to the insanity of the father of the person whose sanity is questioned,[3] and to that of his father and mother and an uncle,[4] and to that of a grandfather,[5] and to that of a sister and nieces.[6] And to that of a brother arising from causes similar to that which had induced the act in question.[7] And reputation in the family as to previous cases of insanity may be proved in such case.[8] Such evidence is not relevant or admissible to show insanity, however, in the absence of proof or an offer to prove that it was hereditary,[9] or that the alleged disease is one which affects the mind.[10] And where a defendant in a prosecution for murder in which insanity is alleged introduces evidence that his sister had been insane, the state may inquire as to what caused the insanity, in order to show that it was not hereditary.[11] So, it must appear that the alleged insanity of the accused is not a temporary malady, and that it is of the same species as that with which other members of his family had been afflicted.[12] And the fact of unsoundness of mind of ancestors or brothers and sisters must be proved by persons speaking from their own personal knowledge and observation, and not by tradition or hearsay.[13] And in order to render heredi-

[1] State v. Windsor, 5 Harr. (Del.) 512; Bradley v. State, 31 Ind. 492. State v. Felter, 25 Iowa, 67; Baxter v. Abbott, 7 Gray, 71; People v. Garbutt, 17 Mich. 9, 97 Am. Dec. 162; Prentis v. Bates, 93 Mich. 234, 17 L. R. A. 494; Walsh v. People, 88 N. Y. 458; Coughlin v. Poulson, 2 McArth. 308; Com., Haskell, v. Haskell, 2 Brewst. 491; Com. v. Winnemore, 1 Brewst. 356; Hagan v. State, 5 Baxt. 615; Reg. v. Tucket, 1 Cox, C. C. 103, 4 L. T. 50. But see M'Adam v. Walker, 1 Dow, P. C. 148.

[2] Reg. v. Tucket, 1 Cox, C. C. 103, 4 L. T. 50. And see State v. Simms, 68 Mo. 305.

[3] State v. Felter, 25 Iowa, 67.

[4] Baxter v. Abbott, 7 Gray, 71.

[5] Reg. v. Tucket, 1 Cox, C. C. 103, 4 L. T. 50.

[6] Prentis v. Bates, 93 Mich. 234, 17 L. R. A. 494.

[7] People v. Garbutt, 17 Mich. 9, 97 Am. Dec. 162; Fraser v. Jennison, 42 Mich. 206.

[8] State v. Windsor, 5 Harr. (Del.) 512.

[9] Reichenbach v. Ruddach, 127 Pa. 564.

[10] Walsh v. People, 88 N. Y. 458.

[11] State v. Hoyt, 47 Conn. 518, 36 Am. Rep. 89.

[12] State v. Christmas, 6 Jones, L. 471.

[13] Coughlin v. Poulson, 2 MacArth. 308.

tary insanity admissible in evidence there must also be evidence tending to prove that the person whose act is questioned was himself insane,[1] or that the act was without apparent motive,[2] though it need not raise a reasonable doubt of his sanity.[3] Nor is evidence admissible in a will contest that several of the family of the testatrix had been afflicted with paralysis in advanced age, accompanied by an enfeeblement of the mental and moral powers, and that it was a family tendency, as bearing upon the question of her mental condition, where the only foundation laid therefor consisted of evidence that two years before she had complained of feeling numb and at that time and afterwards she was physically weak and somnambulent and mentally inactive, and that she had paralysis fifteen months after the execution of the will.[4] And evidence in a prosecution for homicide in which insanity is interposed as a defense, that the accused had one child who was subject to epileptic fits of the same character as those with which he claims to be afflicted, is inadmissible.[5]

§ 12. *Reputation and hearsay.*

A predisposition to insanity cannot be proved by family tradition.[6] And insanity cannot be proved by reputation or public opinion.[7] And evidence of the general reputation of a person in the neighborhood in which he resided, as being insane, is inad-

[1] People v. Smith, 31 Cal. 466; Murphy v. Com. 92 Ky. 485; Laros v. Com. 84 Pa. 200; Doe, Mather, v. Whitefoot, 8 Car. & P. 270. And see State v. Cunningham, 72 N. C. 469; Snow v. Benton, 28 Ill. 306.

[2] People v. Smith, 31 Cal. 466.

[3] Jones v. People, 23 Colo. 276.

[4] Shailer v. Bumstead, 99 Mass. 112.

[5] Hall v. Com. 22 W. N. C. 25.

[6] Com. v. Moss, 6 Kulp, 31.

[7] People v. Pico, 62 Cal. 50; State v. Hoyt, 47 Conn. 518, 36 Am. Rep. 89; Brinkley v. State, 58 Ga. 296; Stewart v. State, 58 Ga. 577; Choice v. State, 31 Ga. 424; Foster v. Brooks, 6 Ga. 291; Grubb v. State, 117 Ind. 277; Walker v. State, 102 Ind. 502; Yeates v. Reed, 4 Blackf. 463, 32 Am. Dec. 43; Ashcraft v. DeArmond, 44 Iowa, 229; Townsend v. Pepperell, 99 Mass. 40; Thompson v. Ish, 99 Mo. 160; Brinkman v. Rueggesick, 71 Mo. 553; Lancaster County Nat. Bank v. Moore, 78 Pa. 407, 21 Am. Rep. 24; Pidcock v. Potter, 68 Pa. 348, 8 Am. Rep. 181; Hall v. Com. 22 W. N. C. 25; McLane v. Elder (Tex. Civ. App.) 23 S. W. 758; Ellis v. State, 33 Tex. Crim. Rep. 86; Wright v. Doe, Tatham, 1 Ad. & El. 3.

missible to prove that a person residing therein was cognizant of the fact.[1] Nor can a witness in an action to set aside a will upon the ground of unsoundness of mind be asked on cross-examination if he would have taken the testator's note during the last year of his life, and if he heard anybody question his sanity.[2] Evidence of the uniform good character as a man and citizen of a person accused of homicide who pleads insanity, however, is competent and admissible as tending to show that he could not have been sane at the time the deed was done.[3] So, hearsay evidence is not admissible to establish the insanity of a party to a contract sought to be annulled.[4] And a witness in an action involving the question of sanity or insanity cannot be allowed to testify to what somebody else said about the acts or conduct of the person alleged to be insane.[5] Nor is evidence as to what a person who took a man accused of murder to the hospital for medical treatment previous to the offense thought as to his mental condition at that time competent, it being merely hearsay.[6] And the same rule applies to evidence that a person's mother from his childhood spoke of him as being diseased in mind, and that he was called crazy by the family.[7] Nor can the draughtsman of a will be asked whether he was ever warned of the fact that the testator was not competent to manage his affairs, and by whom and when.[8] So, evidence of conversations between third parties affirming the insanity of the testator, though had in the presence of the executor without his denying it while the testator was still living, is not admissible to invalidate the will, where the executor did not know of his appointment at that time.[9] And statements by the wife of a person accused of murder whose confession to him is alleged to have made him insane, made to a third party and not known to him, are not admissible on the

[1] Greenslade v. Dare, 20 Beav. 284.
[2] Staser v. Hogan, 120 Ind. 227.
[3] Hopp v. People, 31 Ill. 385.
[4] Myers v. Knabe, 51 Kan. 720.
[5] Kidder v. Stevens, 69 Cal. 414; Barker v. Pope, 91 N. C. 165.
[6] State v. Gut, 13 Minn. 343.
[7] People v. Montgomery, 13 Abb. Pr. N. S. 207.
[8] Waters v. Waters, 35 Md. 531.
[9] Ware v. Ware, 8 Me. 42.

question of his insanity.[1] Nor can a daughter of a testator who had mysteriously left his home and remained away for some time be asked what was said, if anything, in the presence of the proponents of the will in relation to such absence.[2] So, evidence of conversations between the attesting witnesses of a will with reference to the competency of the testator is inadmissible to rebut the effect of their attestation.[3] And a witness testifying as to the mental capacity of a testator cannot be permitted to detail conversations between himself and a third person with relation to the testator and his eccentricities.[4] Nor can such a witness in a criminal action testify that he had expressed the same opinion to a third person some time before and what such third person said in reply.[5]

Questions put to the witnesses in a will contest in which insanity is alleged respecting family history, however, are not objectionable on the ground of being hearsay.[6] And conversations of a testator are admissible upon the question of insanity to show the state of his mind.[7] And the same rule applies to conversations between the plaintiff in an action for a personal injury and the defendant's agent at the time of making a settlement evidenced by a release.[8] But an inference of testamentary incapacity cannot be drawn from conversations between the testator and another which are not disclosed to the jury.[9] The exclusion of evidence in a will contest, upon the ground of unsoundness of mind, of conversations between the testator and his daughters which did not tend to prove unsoundness of mind, is within the discretion of the court.[10] And a question asked a witness as to what the person whose sanity is questioned had said

[1] People v. Hurtado, 63 Cal. 288.
[2] Rush v. Megee, 36 Ind. 69.
[3] Colvin v. Warford, 20 Md. 357.
[4] Hughes v. Hughes, 31 Ala. 519.
[5] People v. Schmitt, 106 Cal. 48.
[6] Fraser v. Jennison, 42 Mich. 206; State v. Windsor, 5 Harr. (Del.) 512; Walker v. State, 102 Ind. 502.
[7] Mullins v. Cottrell, 41 Miss. 291; Staser v. Hogan, 120 Ind. 207.
[8] Missouri P. R. Co. v. Brazzil, 72 Tex. 233.
[9] Irish v. Smith, 8 Serg. & R. 573, 11 Am. Dec. 648. And see People v. Lake, 1 Park. Crim. Rep. 495, Affirmed 12 N. Y. 358.
[10] Vance v. Vance, 74 Ind. 370.

became of a certain deed is irrelevant and immaterial, where it does not appear when the deed was made or what property was transferred by it, and there is nothing to show that the deed was treated otherwise than deeds usually are.[1]

§ 13. *Adjudications and certificates of lunacy.*

The general rule in regard to inquisitions of lunacy is that they are admissible in evidence to establish the insanity of the party in all classes of actions,[2] even as against strangers in the proceeding who had no opportunity to cross-examine witnesses.[3] And records of the probate court showing that a person was treated by it as the lawful guardian of a *non compos* will be received as prima facie evidence of guardianship, after a long lapse of time, to supply direct proof of a probate appointment.[4] So, the record of the appointment of a conservator is admissible to show such appointment, in a criminal prosecution against the ward for an assault upon the conservator while entering the ward's dwelling to perform the duties of his appointment;[5] and evidence of a proceeding taken, in which the commission declared a wife insane, is admissible in a prosecution against her husband for conspiracy to confine her in a lunatic asylum, even in the absence of any allegation of collusion or fraud between the husband and the commissioner.[6] Nor can the admission in

[1] Re Wax's Estate, 106 Cal. 343.

[2] Nichol v. Thomas, 53 Ind. 42; Ockendon v. Barnes, 43 Iowa, 615; Hawkins v. Grimes, 13 B. Mon. 257; Gibson v. Soper, 6 Gray, 279, 66 Am. Dec. 414; Yauger v. Skinner, 14 N. J. Eq. 389; Whitenack v. Stryker, 2 N. J. Eq. 8; Rider v. Miller, 86 N. Y. 507; Osterhout v. Shoemaker, 3 Hill, 513; Hart v. Deamer, 6 Wend. 497; Hoyt v. Adee, 3 Lans. 173; Goodell v. Harrington, 3 Thomp. & C. 345; Wheeler v. State, 34 Ohio St. 394, 32 Am. Rep. 372; Cathcart v. Sugenheimer, 18 S. C. 123; M'Creight v. Aiken, Rice, L. 56; Kerr v. Lunsford, 31 W. Va. 680, 2 L. R. A. 668; Burnham v. Mitchell, 34 Wis. 117; Hume v. Burton, 1 Ridgew, P. C. 204; Sergeson v. Sealey, 2 Atk. 412; Faulder v. Silk, 3 Campb. 126; Cooke v. Turner, 15 Sim. 611. But see Re Pinney's Will, 27 Minn. 280.

[3] Osterhout v. Shoemaker, 3 Hill, 513; M'Creight v. Aiken, Rice, L. 56; Sergeson v. Sealey, 2 Atk. 412.

[4] Thomas v. Hatch, 3 Sumn. 170. And see Edson v. Munsill, 10 Allen, 557.

[5] State v. Hyde, 29 Conn. 564.

[6] Com. v. Spink, 27 W. N. C. 37.

evidence of a record of a commission of lunacy, showing that the obligor in a bond had been a lunatic previous to its execution, and that he was subsequently restored by a decree of the court, on an issue as to the amount of the bond alleged to have been fraudulently obtained for a greater amount than was due, be objected to by the obligee.[1] And an inquisition finding a party to have been a lunatic for a preceding period is not rendered incompetent by a statute providing that the inquiry must be confined to the question of incompetency at the time it was made, where it was submitted to the jury without remark as to its effect other than that it was not conclusive.[2] And orders in the course of lunacy proceedings are admissible as evidence that proceedings were had, but not as evidence of the facts therein stated.[3]

A determination or order in a proceeding not designed to fix the status of the party, however, is not admissible upon an issue as to the insanity of the party.[4] The determination upon a coroner's inquest would appear to be within this rule,[5] and so is a judgment declaring a will invalid.[6] And the record of proceeding under the Nebraska statute in which a person has been adjudged insane and a fit subject for treatment in the hospital for insane persons is not admissible in an action to avoid a deed on the ground of insanity.[7] Nor is a physician's certificate prepared from the statements of relatives and friends of a patient in an insane asylum competent to show his mental condition previous to his confinement.[8] Nor is a written declaration signed by witnesses and a deceased medical attendant, certifying to the sanity of a person, admissible on the issue of testamentary capacity, where the certificate was not an official act.[9]

Records of the public hospital for the insane must be shown to

[1] Stauffer v. Young, 39 Pa. 455.

[2] Dominick v. Dominick, 20 Abb. N. C. 286.

[3] Creagh v. Blood, 2 Jones & L. 509, 8 Ir. Eq. 434.

[4] See Wheeler v. State, 34 Ohio St. 394, 32 Am. Rep. 372; Leggate v. Clark, 111 Mass. 308; Gridley v. Boggs, 62 Cal. 190.

[5] Gridley v. Boggs, 62 Cal. 190.

[6] See Wheeler v. State, 34 Ohio St. 394, 32 Am. Rep. 372; State v. Turner, Wright (Ohio) 26; Jones v. White, 1 Strange, 68.

[7] Dewey v. Allgire, 37 Neb. 6; Leggate v. Clark, 111 Mass. 308.

[8] Butler v. St. Louis L. Ins. Co. 45 Iowa, 93.

[9] Martin v. Johnston, 1 Fost. & F. 122.

have been kept in compliance with the laws of the institution to be admissible on the question of sanity or insanity, and such laws must be introduced to establish the fact.[1] So, a recital in an order appointing a guardian, that the ward is insane, is superfluous and incompetent evidence of testamentary incapacity.[2] And refusal to admit that portion of the adjudication of insanity which instructs the committee appointed as to the scope of his duty is not error.[3] But the admission of a record in a lunacy matter containing recitals and statements which are not evidence and might influence the verdict is not a ground for a new trial where the judge informs the jury that the recitals are not evidence, and cautions them to disregard them.[4] So, a decree dismissing a petition for the appointment of a guardian for an alleged insane person, and a verdict and judgment on appeal from such decree in favor of his sanity, may be given in evidence as tending to show capacity to make a deed.[5] But the dismissal of a petition to place a testator under guardianship with the consent of his children, who afterwards contest the validity of his will, is not material in the will contest upon the question of undue influence.[6]

So, a verdict pronouncing a person sane is not admissible to establish his sanity in a subsequent prosecution for murder, but the offer of such evidence by the district attorney, which was rejected, is not misconduct on his part prejudicial to the defendant.[7] Nor are proceedings on an examination by a commissioner as to the sanity of a person, instituted to determine whether she was a proper subject to be admitted into a hospital, finding that she was of sound mind and at times feigned insanity to escape criminal prosecution, admissible against her on a prosecution for crime.[8]

So, duly authenticated proof of a record of a lunacy proceeding

[1] Butler v. St. Louis L. Ins. Co. 45 Iowa, 93.
[2] Rice v. Rice, 53 Mich. 432.
[3] Kerr v. Lunsford, 31 W. Va. 680, 2 L. R. A. 668.
[4] Creagh v. Blood, 2 Jones & L. 509, 8 Ir. Eq. 434.
[5] Gibson v. Soper, 6 Gray, 279, 66 Am. Dec. 414.
[6] Lewis v. Mason, 109 Mass. 169.
[7] People v. Ward, 105 Cal. 335.
[8] Neanes v. State, 143 Ind. 299.

in another state is admissible in evidence on a petition for the appointment of a committee of a lunatic.[1] But it is of no effect where it appears that notice of a proceeding was not given.[2] And a copy of the records of a probate court in another state, stating that the father of an insured person had been found to be insane, is not admissible in an action upon the insurance policy in which a breach of warranty that none of the family of the insured had been afflicted with insanity was claimed, where no proof is made as to the authority of the court under the laws of that state.[3] Nor is the testimony of a superintendent of a hospital for the insane in another state admissible in such case, where he knew nothing of the disease of the father of the insured, and based his statements upon what was shown by the records of the hospital.[4] So, an inquisition of lunacy is not evidence of insanity prior to the date on which it was made,[5] unless it overreaches and embraces the time of the act in question.[6] And a verdict of a jury upon an inquisition is not admissible upon a traverse of a finding in the inquisition.[7] Nor are proceedings in lunacy finding a mortgagor to have been a lunatic for a period covering the date of the mortgage admissible to invalidate the mortgage in the absence of proof of fraud or notice to the mortgagee of the mortgagor's mental incapacity.[8] But such a record of another court which had been quashed for irregularity, though not competent to prove the person's incapacity to contract, is competent when the proceeding was carried on with the knowledge of the person with whom he contracted to show knowledge on his part of his state of mind.[9] And members of an inquest which found a grantor to be of unsound mind are competent to prove the unsoundness or a lucid interval when the facts are within their knowledge,

[1] Re Linton, 29 W. N. C. 550. And see Re Perkins, 2 Johns. Ch. 124.

[2] Com., Stewart, v. Kirkbridge, 2 Brewst. 419.

[3] Newton v. Mutual Ben. L. Ins. Co. 15 Hun, 597.

[4] Newton v. Mutual Ben. L. Ins. Co. 15 Hun, 597.

[5] Burnham v. Mitchell, 34 Wis. 117; Hovey v. Chase, 52 Me. 304, 83 Am. Dec. 514.

[6] Re Blaker, 27 N. Y. Week. Dig. 486; Goodell v. Harrington, 5 Thomp. & C. 345.

[7] Com., Haskell, v. Haskell, 2 Brewst. 491.

[8] Mills v. Slook, 9 W. N. C. 379.

[9] Prather v. Naylor, 1 B. Mon. 244.

but they cannot be examined as to what they intended by the return to the inquisition.[1] So, a record showing the appointment of a guardian for a grantor is inadmissible in an action to set aside his deed on the ground of mental incapacity, where the proceeding for the appointment of the guardian was long subsequent to the conveyance.[2] And the record of proceeding in lunacy had after the entry of a judgment upon a promissory note is inadmissible in a proceeding to revive the judgment as evidence of the defendant's incapacity to execute the note.[3]

So, the record of proceeding in a separate trial in which one of two defendants jointly indicted is adjudged insane is not evidence either of the fact or of such insanity upon the trial of the indictment.[4] And a judgment roll showing a conviction for murder, containing no suggestion of insanity, is not admissible in a civil action upon a life-insurance policy for the purpose of showing that the insured could not have been insane at the time.[5] Nor is a judgment setting aside a will of a person admissible in an action to set aside a deed made by him on the ground of mental incapacity as tending to show his insanity, where it was rendered some time subsequent to the giving of the deed.[6] Evidence in an action on a note tending to show that the maker was competent to make it at the time is admissible, where the answer alleges the finding of an inquisition of lunacy determining that he had been a lunatic for thirty years.[7] But evidence of a lucid interval is not admissible in Missouri to controvert the insanity of a person who has been placed under guardianship as insane, and *non est factum* may be pleaded to a deed subsequently made by him, and the special matter given in evidence.[8]

[1] Hutchinson v. Sandt, 4 Rawle, 234, 26 Am. Dec. 127; Bowman v. Van Baum, 14 W. N. C. 185.

[2] Hovey v. Chase, 52 Me. 305, 83 Am. Dec. 514. But see Rider v. Miller, 86 N. Y. 507.

[3] Henry v. Brothers, 48 Pa. 70.

[4] Marler v. State, 67 Ala. 55, 42 Am. Rep. 95.

[5] Marceau v. Travelers' Ins. Co. 101 Cal. 338.

[6] Hovey v. Chase, 52 Me. 305, 83 Am. Dec. 514; Gridley v. Boggs, 62 Cal. 190. But see Hanna v. Read, 102 Ill. 596, 40 Am. Rep. 608.

[7] Knox v. Knox, 30 S. C. 377.

[8] Rannells v. Gerner, 80 Mo. 475.

V. Expert and opinion evidence.

§ 1. *Admissibility of opinions of experts—generally.*

The opinions of expert witnesses as to the sanity or insanity of a person are generally if not universally held to be admissible in evidence in all proceedings in which the question arises.[1] Such opinions are admitted because experts are supposed by their study and practice to understand the symptoms of insanity and possess peculiar knowledge on that subject, as the jury might not be able to decide the question correctly,[2] as a scientific deduction from the facts of the case;[3] and may be founded either upon the expert's personal examination of or acquaintance with the person whose sanity is in question, or upon the evidence given by the other witnesses with relation to the question, or upon a hypothetical case stated to the witnesses so framed as to resemble as near as may be the case under consideration;[4] and may be given without stating the grounds upon which they were formed,[5] though such reasons may be asked for or given.[6] Previous opinions of experts, however, are not generally admissible in evidence,[7] though they are so if they are in the shape of official records or certificates required by law.[8]

§ 2. *Opinions founded on examination.*

An expert witness who has had opportunities for knowing and observing a person whose sanity is in question may give an opinion on that question based on knowledge obtained from such ob-

[1] Choice v. State, 31 Ga. 424; Chandler v. Barrett, 21 La. Ann. 58, 99 Am. Dec. 701; Com. v. Brayman, 136 Mass. 438; McGinnis v. Kempsey, 27 Mich. 363; Re Mason, 60 Hun, 46; Clark v. Sawyer, 3 Sandf. Ch. 351; Lake v. People, 1 Park. Crim. Rep. 495; Puryear v. Reese, 6 Coldw. 21; Pigg v. State, 43 Tex. 108; Shelton v. State, 34 Tex. 666; Beavan v. McDonnell, 26 Eng. L. & Eq. 541.

[2] Lake v. People, 1 Park. Crim. Rep. 495.

[3] Coyle v. Com. 104 Pa. 117.

[4] Boardman v. Woodman, 47 N. H. 120; Com. v. Rogers, 7 Met. 500, 41 Am. Dec. 458.

[5] Lodge v. Lodge, 2 Houst. (Del.) 419.

[6] Leache v. State, 22 Tex. App. 279, 58 Am. Rep. 638; People v. Barber, 115 N. Y. 475.

[7] Martin v. Johnston, 1 Fost. & F. 122.

[8] Norris v. Seed, 3 Exch. 782; Lovatt v. Tribe, 3 Fost. & F. 9.

servation,[1] where he fully states the condition, appearance, and conversations of the person at the time.[2] This rule includes the family physician of the person whose sanity is in question.[3] And testimony in a will contest by the testator's attending physician that the fact that testator had judiciously managed his property prior to his last sickness, and the making of his will tended to show that he was subject to no delusion while making it, is competent.[4] And a question asked a physician as to the state of mind of a person upon a particular day, based upon his appearance, actions, condition, and conversation, is not objectionable as leading and suggestive where he had previously testified that he had attended such person for some time including that day, and described his ailments and physical condition, and had conversed with him.[5] Nor is a question asked an expert who had seen and conversed with the testator for an hour or two at a time on three different occasions, whether he would not necessarily have discovered insanity had it existed.[6] So, a medical witness in a criminal prosecution may be asked whether from the whole of his intercourse with the accused it appeared to him that he was insane.[7] And the physician of a testator who had committed suicide, after testifying to his mental condition during the time he attended him, may be asked in a will contest to state from his personal knowledge whether the testator's condition had been or was yet an indication of insanity, and what the act of suicide would indicate on the question of soundness or unsoundness of

[1] McAllister v. State, 17 Ala. 434, 52 Am. Dec. 180; Potts v. House, 6 Ga. 324; State v. Felter, 25 Iowa, 67; Hathorn v. King, 8 Mass. 371, 5 Am. Dec. 106; Baxter v. Abbott, 7 Gray, 71; McHugh v. Fitzgerald, 103 Mich. 21; Rice v. Rice, 53 Mich. 432; Horah v. Knox, 87 N. C. 490; State v. Potts, 100 N. C. 457; Bitner v. Bitner, 65 Pa. 347; Gibson v. Gibson, 9 Yerg. 329; Pigg v. State, 43 Tex. 108; Brown v. Mitchell, 75 Tex. 9; Harris v. State, 18 Tex. App. 287; McClackey v. State, 5 Tex. App. 320; Foster v. Dickerson, 64 Vt. 233.

[2] Brown v. Mitchell, 75 Tex. 9; McHugh v. Fitzgerald, 103 Mich. 21; Harris v. State, 18 Tex. App. 287.

[3] Hall v. Perry, 87 Me. 569.

[4] Coryell v. Stone, 62 Ind. 307.

[5] Wheelock v. Godfrey, 100 Cal. 578.

[6] Foster v. Dickerson, 64 Vt. 233.

[7] Frith's Case, 22 How. St. Tr. 307.

mind.[1] And such a physician may be asked in an action upon an insurance policy in which it is claimed that the assured killed himself while insane, what from his experience or reading, and from his acquaintance with the mental condition of the deceased, the effect would be, if any, of the disease of melancholia as to power to control the actions or resist impulses with which one might be seized, and how he thought it might be in the present case.[2] So, such a physician who states on an inquisition of lunacy that he had met and conversed with the alleged lunatic in order to test the condition of his mind and notice his general appearance may be asked whether he discovered any evidence of unsoundness, and be permitted to state his opinion upon the question of insanity, though he claimed to have formed no settled opinion as to the depth of his mind.[3] And an expert who testifies in a criminal action that the accused presented the appearance of an abject and despairing man may explain the reason for such opinion.[4] And such opinions are not confined to experts who were the attending physicians of the person whose sanity is in question.[5] An expert witness cannot be allowed to give an opinion as to the mental condition of the person founded upon personal examination, however, without first showing the circumstances and facts upon which such opinion is based;[6] and such opinions stating no facts as a basis therefor would be inadmissible,[7] though the contrary has been held in Maryland.[8]

So, the evidence of a physician sent to the jail by the prosecuting attorney to make an examination of the prisoner's mental and physical condition, as to his opinion thereon, is not subject to the objection that he was thereby compelled to furnish evidence against himself.[9] But the court in a criminal prosecution

[1] Frary v. Gusha, 59 Vt. 257.
[2] Koenig v. Globe Mut. L. Ins. Co. 10 Hun, 558.
[3] Re Carmichael, 36 Ala. 514.
[4] Coyle v. Com. 104 Pa. 117.
[5] Bitner v. Bitner, 65 Pa. 347.
[6] Chandler v. Barrett, 21 La. Ann. 58, 99 Am. Dec. 701; Hathorn v. King, 8 Mass. 371, 5 Am. Dec. 106; White v. Bailey, 10 Mich. 155; Gibson v. Gibson, 9 Yerg. 329; Puryear v. Reese, 6 Coldw. 21. But see Potts v. House, 6 Ga. 324, 1 Am. Dec. 329.
[7] Dickinson v. Barber, 9 Mass. 225, 6 Am. Dec. 58.
[8] Crockett v. Davis, 81 Md. 134.
[9] People v. Kemmler, 119 N. Y. 580.

will not stop the trial and give the physician called by the defense time to observe the defendant and form an opinion as to his sanity, where he had already delayed the trial for a long time by dilatory methods, during which there was ample time to make such observation.[1] And an expert who had stated on a hypothetical case that in his opinion the defendant was insane cannot be subsequently asked to state his opinion as to the condition of his mind at the time of the act judging from a personal examination since made and the hypothetical case upon which he had already expressed his opinion, things occurring since the act having little or no weight as evidence of the condition of his mind at the time.[2] So, it is not necessary to the admissibility of the opinion of an expert that he should have heard all of the evidence where his opinion is based upon his own knowledge and observation, and what was said to him by the person whose sanity is questioned.[3] And the exclusion of expert witnesses from the court-room during the trial is not error where they are not called upon for an opinion based upon the other testimony, but simply as witnesses to give evidence of the condition of the person as derived from personal acquaintance with him.[4] The rule has been laid down in a Maine case, however, that an expert witness cannot be asked to state facts tending to show the state of mind of a person whose sanity is in question as to soundness, but can only be permitted to state how he appeared with reference to soundness or unsoundness.[5]

§ 3. *Opinions based upon the evidence.*

By the weight of authority the opinions of expert witnesses on the question of the sanity or insanity of a person, based upon facts proved at the trial, assuming them to be true, are competent evidence, though they had made no personal examination and knew nothing of the actual facts.[6] And it is proper to ask

[1] State v. Crisp, 126 Mo. 605.
[2] State v. Welsor, 117 Mo. 570.
[3] State v. Hayden, 51 Vt. 296; State v. Gould, 40 Kan. 258.
[4] Johnson v. State, 10 Tex. App. 571.
[5] Wyman v. Gould, 47 Me. 159.
[6] McAllister v. State, 17 Ala. 434, 52 Am. Dec. 180; State v. Windsor, 5 Harr. (Del.) 512; Potts v. House, 6 Ga. 324, 1 Am. Dec. 329; Negroes

the witness as to the nature of the person's insanity, and as to what state of mind the symptoms indicated, and what he would expect the person's conduct to be under the supposed circumstances.[1] The attention of the witness may be called to such acts as are claimed by one party to show sanity, and his opinion taken as to whether such facts, together with those claimed to have been proved by the other party, are inconsistent with the claim of insanity.[2] And the better practice has been held to be to allow medical experts, called solely as such, to remain in the room and hear all the testimony in order that from the whole they might be able to determine the matters upon which their opinions are desired, though where this has not been done, a hypothetical case embracing all the facts may be submitted.[3] Where there is any conflict of evidence, or any doubt as to what the evidence is, the expert should be required to state fully his understanding as to what facts are established thereby.[4] And the facts upon which his opinion is founded must be stated and the jury left to determine, not only the truth of the facts, but of the opinion founded thereon.[5]

A refusal to permit an expert witness who had heard all of the evidence to give his opinion upon the facts stated, however, is not error where the court permits the witness to be asked his opinion upon an hypothetical case corresponding with the testimony, or permits the evidence to be read and his opinion to be

Jerry v. Townshend, 9 Md. 145; Com. v. Rogers, 7 Met. 500, 41 Am. Dec. 458; Kempsey v. McGinniss, 21 Mich. 123; State v. Klinger, 46 Mo. 224; People v. Barber, 115 N. Y. 475; State v. Potts, 100 N. C. 457; Yardley v. Cuthbertson, 108 Pa. 395, 56 Am. Rep. 218; Vance v. Upson, 66 Tex. 476; Webb v. State, 9 Tex. App. 490; Foster v. Dickerson, 64 Vt. 233; State v. Hayden, 51 Vt. 296; Rex v. Wright, Russ. & R. C. C. 456; Rex v. Searle, 1 Moody & R. 75; McNaghten's Case, 10 Clark & F. 200. And see Re Storer, 28 Minn. 9.

[1] Com. v. Rogers, 7 Met. 500, 41 Am. Dec. 458.

[2] Prentis v. Bates, 93 Mich. 234, 17 L. R. A. 494. And see Reg. v. Frances, 4 Cox, C. C. 57.

[3] Johnson v. State, 10 Tex. App. 571; Leache v. State, 22 Tex. App. 279, 58 Am. Rep. 638.

[4] Bennett v. State, 57 Wis. 67, 46 Am. Rep. 26.

[5] Kempsey v. McGinniss, 21 Mich. 123; Wetherbee v. Wetherbee, 38 Vt. 454.

asked on the supposition that the facts were true.[1] And it has been held that an expert witness on the question of sanity cannot be asked his opinion from the whole evidence where it is conflicting, and that the question put to him should state particular facts in evidence, hypothetically assuming them to be true, so framed that the jury can see upon what particular assumed facts his opinion is based.[2] And that questions put to such a witness must be framed hypothetically unless there is no conflict of evidence as to the facts, or unless the expert is personally acquainted with them.[3] And the rule has been laid down by other cases absolutely that the opinions of expert witnesses as to the sanity of a person should not be given upon the evidence in the case, but may be asked for generally with reference to a similar case hypothetically stated,[4] a question calling for his opinion as to the facts proved, involving a determination of the truth of such facts as well as the scientific conclusions to be drawn therefrom.[5] Nor can he state what insanity is, or what causes insanity, but must assume hypothetical facts when he tells the jury his conclusion.[6] And the court need not have the testimony read to him to enable him to express an opinion.[7] Error in permitting an expert witness to give his opinion as to the mental condition of a person instead of a hypothetical statement, however, is not ground for a reversal where the answer to the question did not prejudice his substantial rights.[8]

[1] McCann v. People, 3 Park. Crim. Rep. 272.

[2] Gunter v. State, 83 Ala. 96; Reed v. State, 62 Miss. 405; Tingley v. Cowgill, 48 Mo. 291; Woodbury v. Obear, 7 Gray, 467; Kempsey v. McGinniss, 21 Mich. 123; Coyle v. Com. 104 Pa. 117; Bennett v. State, 57 Wis. 67; Dexter v. Hall, 82 U. S. 15 Wall. 9, 21 L. ed. 73; United States v. McGlue, 1 Curt. C. C. 1.

[3] State v. Maier, 36 W. Va. 757.

[4] McCarty v. Com. 14 Ky. L. Rep. 285; Choice v. State, 31 Ga. 424; Negroes Jerry v. Townshend, 9 Md. 145; State v. Coleman, 20 S. C. 441; Kerr v. Lunsford, 31 W. Va. 680, 2 L. R. A. 668; McMechen v. McMechen, 17 W. Va. 683, 41 Am. Rep. 682; Doe, Bainbrigge, v. Bainbrigge, 4 Cox, C. C. 454; Reg. v. Frances, 4 Cox, C. C. 57. Overruling McNaughten's Case, 1 Car. & K. 130, note.

[5] Reed v. State, 62 Miss. 408.

[6] Price v. Richmond & D. R. Co. 38 S. C. 199.

[7] Choice v. State, 31 Ga. 424.

[8] McCarty v. Com. 14 Ky. L. Rep. 285; Jones v. People, 23 Colo. 276.

So, the rule has been laid down that an expert witness cannot be allowed to give an opinion as to the sanity or insanity of a person based upon the evidence he had heard alone when he had not heard it all,[1] where there was no hypothetical case or agreed state of facts submitted to him,[2] or where it does not appear what part of it he did hear.[3] But it has been held, upon the other hand, that expert witnesses who did not hear all of the testimony tending to show the mental condition of the accused may give an opinion founded upon the proof heard by them.[4] But he must first be made acquainted with the whole of it upon which he is to pronounce his opinion.[5] The New York rule has been stated to be that an expert cannot give a general opinion as to sanity or insanity, but should simply state what the facts proved or claimed to be proved indicate as to the mental condition of the party in question.[6] An opinion of a medical expert given on a former trial is not rendered inadmissible on a subsequent one by the fact that new matters were introduced on the second trial concerning which no cross-examination was had.[7]

§ 4. *Opinions upon hypothetical questions.*

The rule admitting the opinions of expert witnesses based on hypothetical questions or statements of the facts, as to sanity or insanity, would seem to be practically if not entirely universal.[8] And a physician may give his opinion as to sanity or insanity upon the basis of a hypothetical case, together with what he has learned upon a personal examination.[9] Questions put to medi-

[1] Brown v. Com. 14 Bush, 398; Webb v. State, 9 Tex. App. 490; People v. Thurston, 2 Park. Crim. Rep. 49.

[2] Brown v. Com. 14 Bush, 398.

[3] Kempsey v. McGinniss, 21 Mich. 123.

[4] People v. Lake, 12 N. Y. 358; Lake v. People, 1 Park. Crim. Rep. 495; State v. Gould, 40 Kan. 258.

[5] Yardley v. Cuthbertson, 108 Pa. 395, 56 Am. Rep. 218.

[6] People v. Lake, 12 N. Y. 358.

[7] First Nat. Bank v. Wirebach, 106 Pa. 37.

[8] See Pittard v. Foster, 12 Ill. App. 132; People v. Thurston, 2 Park. Crim. Rep. 49; Lake v. People, 1 Park. Crim. Rep. 495; Hathaway v. National L. Ins. Co. 48 Vt. 336; Webb v. State, 9 Tex. App. 490; Dexter v. Hall, 82 U. S. 15 Wall. 9, 21 L. ed. 73.

[9] State v. Wright, 134 Mo. 404.

cal experts upon the issue of insanity should be so framed as to require them to state the measure of capacity in their own language, and by such ordinary terms and forms of expression as will best convey their ideas to the jury.[1] And the hypothesis must be clearly stated so that the jury may know with certainty upon what state of assumed facts they base their opinions;[2] and be so framed as to fairly reflect facts either admitted or proved by other witnesses, and must not assume as proved that which has not been.[3] And there must have been evidence tending to show every supposed fact embraced within them.[4] Hypothetical questions are not competent when not based on facts proved, but consist largely of deductions drawn from the character of the act in question.[5] Nor can experts be asked questions which assume the existence of a delusion in the absence of evidence to support the assumption.[6] And a hypothetical question in a will contest, assuming that a remark of a testator concerning his desire to visit his sister if he knew where she lived referred to a sister who had been dead for many years rather than to a living sister, is objectionable and inadmissible.[7] The hypothesis must be based on facts admitted or established, or which, if controverted, the jury might legitimately find on weighing the evidence.[8] And it cannot be based on conclusions of fact which can only be found by a jury.[9]

Technical accuracy, however, is not required, and the question

[1] Fairchild v. Bascomb, 35 Vt. 398.

[2] Kerr v. Lunsford, 31 W. Va. 680, 2 L. R. A. 668; McMechen v. McMechen, 17 W. Va. 683, 41 Am. Rep. 682. And see Re Barber, 63 Conn. 393, 22 L. R. A. 90.

[3] Ballard v. State, 19 Neb. 610. And see Davis v. State, 35 Ind. 496, 9 Am. Rep. 760.

[4] Hathaway v. National L. Ins. Co. 48 Vt. 336; Prather v. McLelland, 76 Tex. 574; Re Ames, 51 Iowa, 596; Fraser v. Jennison, 42 Mich. 206.

[5] Vance v. Upson, 66 Tex. 476; Van Deusen v. Newcomer, 40 Mich. 90. And see State v. Scott, 41 Minn. 365.

[6] State v. Scott, 41 Minn. 365.

[7] Carpenter v. Bailey, 94 Cal. 406.

[8] People v. Augsbury, 97 N. Y. 501; Re Mason, 60 Hun, 46; Re Norman, 72 Iowa, 84.

[9] Ballard v. State, 19 Neb. 610.

need not be based on decided facts.[1] It is not a question as to the weight of the evidence, but rather one as to whether there was any evidence tending to prove the fact upon which the question is based.[2] And if it substantially embraces the facts relating to the subject as disclosed by the evidence, it is sufficient.[3] But it must not go outside of the facts as to which some evidence has been given, and which therefore could be assumed as the possible truth,[4] though answers to hypothetical questions are not objectionable because they include considerations not referred to in the questions as constituting the basis of an opinion given, where they are such as the testimony tends to prove and as might have been properly included in the questions.[5] And all the facts upon both sides of the issue should not be incorporated in one question where they are conflicting; in such case the expert's attention should be called to their opposing tendency with a view to obtaining an explanation from the use of his skill.[6] But counsel may base the hypothesis on a state of facts which the evidence tends to prove according to his assumption, and in accordance with his theory of them.[7] And it is a question for the jury as to whether the supposed facts stated in the question correspond with the facts proved.[8] And whenever it supposes facts not given in evidence it should be disregarded,[9] and should be rejected where the hypothesis is not proved to have been well founded.[10] And

[1] Meeker v. Meeker. 74 Iowa, 352; Guetig v. State, 66 Ind. 94, 32 Am. Rep. 99.

[2] Re Norman, 72 Iowa, 84; Leache v. State, 22 Tex. App. 279, 58 Am. Rep. 638.

[3] State v. Baber, 74 Mo. 292, 41 Am. Rep. 314.

[4] People v. Smiler, 125 N. Y. 717.

[5] Hathaway v. National L. Ins. Co. 48 Vt. 336.

[6] Fairchild v. Bascomb, 35 Vt. 398. But see Webb v. State, 9 Tex. App. 490.

[7] Goodwin v. State, 96 Ind. 550; Bever v. Spangler, 93 Iowa, 576; Kerr v. Lunsford, 31 W.Va. 680, 2 L. R. A. 668. And see Prentis v. Bates, 93 Mich. 234, 17 L. R. A. 494.

[8] People v. Thurston, 2 Park. Crim. Rep. 49; Lake v. People, 1 Park. Crim. Rep. 495; State v. Baber, 74 Mo. 292, 41 Am. Rep. 314; State v. Pagels, 92 Mo. 300.

[9] State v. Pagels, 92 Mo. 300.

[10] Cornwell v. Riker, 2 Dem. 354; Hovey v. Chase, 52 Me. 305, 83 Am. Dec. 514.

the jury is not to take it for granted that the statements contained in hypothetical questions are true, but is to carefully scrutinize the evidence and determine from it what facts are true and what untrue.[1]

So, while all facts should be excluded from a hypothetical question of the existence of which the jury can judge as well as the expert,[2] no portion of the actual history of the case of which evidence has been given, and which, taken in connection with the other circumstances, is proper to be considered as showing the mental condition, should be excluded on the ground that it has no tendency of itself to support the claim of insanity.[3] And the question must be founded on a given state of facts embracing all the facts relied upon to show the theory claimed.[4] So, hypothetical questions founded upon the testimony of witnesses previously examined must be so shaped as to give the expert no occasion to draw his conclusion from the evidence, and from such conclusion express his opinion, or to decide as to the weight of evidence or the credibility of witnesses, and his answers must be such as not to involve such a conclusion or such an opinion,[5] such a determination operating as an encroachment upon the functions and province of the jury.[6] And the contestants of a will cannot introduce contradictory evidence upon a given point and then base hypothetical questions upon the theory that some of the witnesses are correct and some mistaken.[7] So, a hypothetical question covering many things of which there is no proof or offer of proof, and conditions not necessarily indicating insanity, going into the history, eccentricities, and physical condition and personal traits

[1] Guetig v. State, 66 Ind. 94, 32 Am. Rep. 99.

[2] Prentis v. Bates, 88 Mich. 567.

[3] Prentis v. Bates, 93 Mich. 234, 17 L. R. A. 494; Bever v. Spangler, 93 Iowa, 576.

[4] Lake v. People, 1 Park. Crim. Rep. 495; McCullough's Will, 35 Pittsb. L. J. 169; Webb v. State, 9 Tex. App. 490.

[5] Kerr v. Lunsford, 31 W. Va. 680, 2 L. R. A. 668; McMechen v. McMechen, 17 W. Va. 683, 41 Am. Rep. 682; Smith v. Hickenbottom, 57 Iowa, 733; Com. v. Rogers, 7 Met. 500, 41 Am. Dec. 458; Kempsey v. McGinniss, 21 Mich. 123; Dexter v. Hall, 82 U. S. 15 Wall. 9, 21 L. ed. 73.

[6] Kempsey v. McGinniss, 21 Mich. 123.

[7] Prentis v. Bates, 88 Mich. 567.

of the person whose sanity is in question, and his relatives, is objectionable as tending to lead the jury to suppose that each of the enumerated circumstances indicated insanity.[1] Nor is it proper or competent to predicate a hypothetical question upon all the evidence in the case, whether the witness had heard it all or not, upon the assumption that he recollects it, as it would be impossible for the jury to determine the facts upon which such opinion was based, and whether such facts were proved or not.[2]

§ 5. *Qualification of experts.*

A general knowledge as a medical man, at least, is required to enable one to testify as an expert in questions pertaining to insanity.[3] Persons of scientific training upon the subject, and physicians only, have been regarded as experts.[4] A witness does not qualify himself to give his opinion as to the sanity of a person as an expert by testimony that he had observed his eyes while in court, and that he had been a good deal with insane persons and noticed their eyes, where it does not appear in what capacity he came in contact with insane persons or what opportunities for observation he had.[5] Nor is one qualified by testimony that he had had experience with men claimed to be insane and had taken charge of them and taken care of them.[6] And a witness who had several years before been the physician of a person whose sanity was questioned for a short time, but had not seen him for a considerable period and had no knowledge of his condition at the time of the act in question, is not competent to give an opinion as to his sanity at that time.[7] As a general rule, however, physicians and surgeons of practice and experience are experts upon the question of sanity or insanity, and it is not necessary that they should have made the particular disease involved in the inquiry a specialty to render their testimony admissible as that of

[1] Fraser v. Jennison, 42 Mich. 206.
[2] People v. McElvaine, 121 N. Y. 250.
[3] State v. Crisp, 126 Mo. 605.
[4] Com. v. Brayman, 136 Mass. 438.
[5] McLeod v. State, 31 Tex. Crim. Rep. 331.
[6] State v. Crisp, 126 Mo. 605.
[7] Russell v. State, 53 Miss. 367.

experts.[1] And physicians of experience who had been the medical advisers of the person whose sanity is in question, and who saw and conversed with him a short time before the act in question, are competent to give opinions as to his sanity though they had not made mental diseases a special study.[2] So, physicians who knew the accused in a criminal prosecution personally, and who observed him in jail after the commission of the offense, and who had a fair portion of such cases under treatment in the course of their practice, may be permitted to give opinions as to his mental condition, though they did not profess to be experts.[3] And where epileptic insanity is alleged an expert who had seen the accused within an hour after the offense may give an opinion as to whether there were any indications in his appearance of a recent epileptic attack; and evidence by a physician called by both parties who said that he had been in practice for seventeen years cannot be objected to when testifying as an expert upon the ground that he was not proved to be one.[4]

So, the evidence of an expert in mental diseases, in a will contest, that the person whose sanity was questioned was insane, is not rendered incompetent by the fact that he had testified that he was ignorant of the effect of a certain disease included in the facts assumed in questioning him.[5] And a practising physician of twenty-eight years' standing, in charge of an institution for the feeble minded, who had studied the disease of insanity sufficiently to give a medical opinion and to diagnose a case of insanity, is competent on that question, the extent of his experience and learning acting on his credibility and not on his competency.[6] So, the testimony of a person's family physician, describing his apparent physical condition and stating that he appeared as if in the last stages of second childhood, is admissible, though he was not an expert in mental diseases and had not attended him for ten years previous to his death and had only seen him a few

[1] Hathaway v. National L. Ins. Co. 48 Vt. 336; State v. Reddick, 7 Kan. 143.

[2] Hastings v. Rider, 99 Mass. 624; Baxter v. Abbott, 7 Gray, 71. And see Hathorn v. King, 8 Mass. 371, 5 Am. Dec. 106.

[3] Phelps v. Com. 17 Ky. L. Rep. 706.

[4] Wheelock v. Godfrey, 100 Cal. 578.

[5] Nash v. Hunt, 116 Mass. 237.

[6] Montgomery v. Com. 88 Ky. 509.

times for a number of years.[1] So, physicians in general practice and nurses are competent witnesses on the question whether pulmonary diseases, nervous derangements, and general debility would in the progress of the disease impair the mental powers of the afflicted person.[2] And proof that a witness had been a nurse in an insane asylum for many years, and had had extended experience in nursing the insane, and that she conversed with the person whose sanity is questioned for an hour or two at a time on three different occasions, is sufficient to lay a foundation for her opinion as to such person's sanity or insanity.[3] And a Roman Catholic priest regularly educated, who officiated as such for ten years, part of his preparatory education being designed to make him competent to pass upon the mental condition of communicants in his church to the end that he might administer the rights of the church to invalids or dying persons when they were in a proper state of reason, is properly qualified to express such an opinion with reference to the persons whom he attends.[4]

The rule that skilled and reputable physicians may testify to the mental conditions of their patients when they have had adequate opportunity of observing and judging of their mental qualities, however, does not apply to one who was not an attending physician and had made but a single examination *pendente lite* in order to inform himself as a witness.[5] And a person, though he be a graduate in medicine and a practising physician, who is not conversant with insanity in any of its various forms, and who never had the care and superintendence of insane persons or made the subject of mental disease a study, has been held to be incompetent to express his opinion upon the evidence given upon an issue as to sanity or insanity.[6] And twenty years of medical experience confined to the ordinary business of a country practitioner has been held to be insufficient to qualify one to testify as an expert upon hypothetical questions as to supposed facts of which he had no personal knowledge.[7] So, a physician who had

[1] Lewis v. Mason, 109 Mass. 169.
[2] Fairchild v. Bascomb, 35 Vt. 398.
[3] Foster v. Dickerson, 64 Vt. 233.
[4] Toomes's Estate, 54 Cal. 509, 35 Am. Rep. 83.
[5] Fayette v. Chesterville, 77 Me. 28, 52 Am. Rep. 741.
[6] Reed v. State, 62 Miss. 405.
[7] Russell v. State, 53 Miss. 367.

not made a special study of insanity, and had considered the matter only so far as to determine whether a patient required treatment for insanity or not, and if so to call in the services of a physician who had made a special study of the subject, or recommend the removal of the patient to a hospital for the treatment of the insane, cannot be regarded as an expert on the question of insanity upon an hypothetical case.[1] And the rule has been laid down generally that to qualify a witness to testify as an expert it is essential that he be or profess to be an expert on the general subject of insanity, and that acquaintance with cognate subjects will not suffice unless the matter inquired about is common to both,[2] and that the opinion of a witness may be excluded where he testifies that he had not made diseases of the mind a special study.[3] The question as to the competency of a witness offered as an expert on the question of sanity or insanity is one for the decision of the court alone, the opinion of the witness himself being immaterial.[4] And the decision is usually final though it may be reviewed in extreme cases, where a serious mistake has been committed from some accident, hindrance, or misconception,[5] and when the witness is permitted to testify he stands substantially on the same footing as to credibility as any other witness.[6] And witnesses will be presumed on appeal to have been experts on a subject in regard to which they were inquired of where nothing is shown to the contrary.[7] And after a lapse of thirty years it will be presumed that visits required by statute to be made to a lunatic asylum by medical attendants were duly made, and that the examinations were properly conducted and the opinions of such attendants as to the sanity of a party then residing in an asylum visited are admissible on that issue when formed from such visits, though the scope of their official duty was rather as to hygiene than as to sanity.[8]

[1] Com. v. Rich, 14 Gray, 335.

[2] Russell v. State, 53 Miss. 367.

[3] Hutchins v. Ford, 82 Me. 363. And see Fairchild v. Bascomb, 35 Vt. 398.

[4] Boardman v. Woodman, 47 N. H. 120; Eggers v. Eggers, 57 Ind. 461; Fayette v. Chesterville, 77 Me. 28, 52 Am. Rep. 741.

[5] Fayette v. Chesterville, 77 Me. 28, 52 Am. Rep. 741.

[6] Eggers v. Eggers, 57 Ind. 461.

[7] Melendy v. Spaulding, 54 Vt. 517.

[8] Martin v. Johnston, 1 Fost. & F. 122.

§ 6. *Scope of opinion of experts.*

A proper form of a question asked an expert witness on the question of sanity or insanity is, Was the person of sound or unsound mind?[1] And a witness competent to give his opinion as to the mental condition of a person may state it as to the degree of capacity or incapacity of a person by reason of a disorder with which he is afflicted, and whether the disorder seems to have rendered him insane.[2] Nor is it improper to ask an expert if he had discovered anything that led him to think the person in question was insane, though it is not claimed that his insanity was of a type which manifested itself in paroxysms or frenzy.[3] And he may be asked in a will contest whether the testator was in a mental and physical condition to transact any business requiring an exercise of judgment and reason and a consecutive continuance of thought.[4] So, an expert who had given his opinion on a hypothetical question as to mental unsoundness may be asked in regard to the state and degree then indicated, and how it would disqualify the person from business or render him unconscious of the nature of his conduct; and he should be inquired of as to whether the facts are explainable in any other mode than upon the theory of insanity, and with what degree of certainty they indicate the inference drawn.[5] And he may be asked if, supposing a man had inherited a predisposition to insanity, great mental anxiety and great misfortunes would be likely to develop the disease.[6] And where epileptic insanity is alleged in a criminal prosecution he may give his opinion as to the effect of epilepsy upon the memory, and an opinion as to the person's power of memory from the nature and course of his narrative on the witness stand as an illustration;[7] or as to whether paralysis tends to impair the mind in age.[8] But he cannot be

[1] Pannell v. Com. 86 Pa. 260; Schneider v. Manning, 121 Ill. 376. And see Kempsey v. McGinniss, 21 Mich. 123.

[2] United States v. Guiteau, 1 Mackey, 498, 47 Am. Rep. 247.

[3] Pannell v. Com. 86 Pa. 260.

[4] Kempsey v. McGinniss, 21 Mich. 123. And see McClintock v. Curd, 32 Mo. 419.

[5] Reed v. State, 62 Miss. 405.

[6] Dejarnette v. Com. 75 Va. 867.

[7] Com. v. Buccieri, 153 Pa. 535.

[8] Lord v. Beard, 79 N. C. 5.

asked whether certain mental troubles would constitute a sufficient cause to produce insanity, the issue being whether the defendant was insane and not what would be sufficient to produce insanity.[1] Nor can a medical expert be asked on his examination in chief what he considers some of the commonest and most frequent causes of epilepsy and insanity.[2] A practicable mode of examining an expert witness upon the question of insanity is to inquire as to the particular symptoms of insanity, asking whether all or any, and which, of the circumstances spoken of upon the trial should be regarded as such symptoms, and to inquire whether any, and what, combination of these circumstances would amount to proof of insanity.[3] And an expert witness may give his opinion on a hypothetical statement as to what the symptoms of insanity are, the question as to whether such facts existed or such symptoms are proved being left exclusively to the jury;[4] and state whether a certain trait of character was a vice or a disease, the question whether it was an indication of insanity involving the question of its nature.[5] But questions as to whether certain specified symptoms in connection with other testimony not specified do not specifically indicate unsoundness of mind are improper.[6] And refusal to permit him to explain to the jury the structure of the brain, what changes are produced upon it by bodily disease, and how irritation and inflammation affect it, and the manner in which a person with a diseased brain might be induced to act, is not error, where he is permitted to state his opinion that the person was insane.[7] So, a question as to whether in the opinion of an expert the person might have recovered his sanity, assuming his condition to have been as stated by another expert, calls for his opinion upon the facts stated, and not upon such facts combined with his opinion, and is therefore competent.[8] But medical experts cannot give their opinions as to the value of the opinion

[1] Carter v. State, 56 Ga. 463.
[2] Hall v. Com. 22 W. N. C. 25.
[3] McCann v. People, 3 Park. Crim. Rep. 272.
[4] Lake v. People, 1 Park. Crim. Rep. 495.
[5] United States v. Guiteau, 1 Mackey, 498, 47 Am. Rep. 247.
[6] Re Storer, 28 Minn. 9.
[7] Anderson v. State, 42 Ga. 9. And see Davis v. United States, 165 U. S. 373, 41 L. ed. 750.
[8] Foster v. Dickerson, 64 Vt. 233.

on such a question of a witness not an expert.[1] So, it is proper in a prosecution for homicide to ask a medical expert if there is any known form of insanity where the mind occasionally becomes a blank, such question calling for a fact and not being of a nature rendering hypothesis necessary.[2] And he may testify in a prosecution for homicide against one who killed a person who suddenly awoke him from a sound sleep,[3] that persons asleep sometimes act as if awake, and do many things of which they are unconscious, and that with many there is a period between sleeping and waking in which they are unconscious, which may be caused by loss of sleep or other causes producing nervous depression or mental anxiety. And he may be asked whether, supposing a man imagined that someone was at his door when there had been no sound, and seized his gun and went out, afterwards asserting that he chased a relative of the family away from his door when no one in fact had been there, it would indicate in his opinion that he was sane or insane.[4]

Unless the jury treat physical or mental manifestations given in evidence as facts, however, they cannot treat as evidence the opinions of professional witnesses based thereon.[5] And an expert witness cannot be asked questions calling for conclusions based upon facts not stated,[6] or upon facts standing alone having no tendency to show insanity,[7] or upon incompetent evidence,[8] or upon hearsay,[9] or upon the opinions of others,[10] or upon representations made to him by the family and physician of a person whose sanity is in question,[11] or based in part upon his own examination but mainly upon what he was told for the purpose of examina-

[1] People v. Webster, 59 Hun, 398.

[2] People v. Osmond, 138 N. Y. 80.

[3] Fain v. Com. 78 Ky. 183, 39 Am. Rep. 213.

[4] Rush v. Megee, 36 Ind. 69.

[5] Kempsey v. McGinniss, 21 Mich. 123.

[6] Van Deusen v. Newcomer, 40 Mich. 90; Bomgardner v. Andrews, 55 Iowa, 638.

[7] Prentis v. Bates, 88 Mich. 567.

[8] Helad v. Thing, 45 Me. 392; People v. Hawkins, 109 N. Y. 408.

[9] Conely v. McDonald, 40 Mich. 150; People v. Holmes (Mich.) 63 N.W. 501.

[10] Barber's Appeal, 63 Conn. 393, 22 L. R. A. 90.

[11] Helad v. Thing, 45 Me. 392; United States v. Faulkner, 35 Fed. Rep. 730.

tion;[1] nor are such representations admissible as a basis for the opinion.[2] And he cannot testify as to a particular case claimed to be an analogous one.[3] And an account received from the maniac or an unprofessional nurse as to the development of his disease is not admissible for that purpose.[4] Nor can the superintendent of an insane asylum after the death of the patient whom he never saw give testimony based upon the absence from the records of the asylum of things which he claimed would undoubtedly have been noticed if they had existed.[5] But all things properly admitted in evidence to show the mental condition of a person may be considered in forming an opinion,[6] and a record of the condition and treatment of a patient in a hospital, produced by the superintendent as a part of a series of records of which he is the official custodian, and purporting to have been contemporaneously made by the attending physician in the performance of his duties, is admissible as a foundation for the opinion of an expert without identifying the person who made it.[7]

So, a question is objectionable which assumes a state of facts upon which no medical or expert opinion should be based.[8] Thus, while medical experts may give the reasons upon which their opinions are founded,[9] inferences from facts which are in the range of ordinary judgment and experience are to be drawn by the jury, and cannot be proved as facts by the opinions of experts.[10] And the mere doubt of an expert is not admissible.[11] Nor can a medical witness in an action upon an insurance policy be asked whether he would attribute the suicide of the insured to melancholia, assuming that he had that form of insanity, as it calls for

[1] Wetherbee v. Wetherbee, 38 Vt. 454.

[2] Wetherbee v. Wetherbee, 38 Vt. 454.

[3] People v. Holmes (Mich.) 69 N. W. 501.

[4] Wood v. Sawyer, Phill. L. 259.

[5] Prentis v. Bates, 88 Mich. 567.

[6] Bever v. Spangler, 93 Iowa, 576.

[7] Townsend v. Pepperell, 99 Mass. 40.

[8] Thornton v. Thornton, 39 Vt. 122.

[9] Leache v. State, 22 Tex. App. 279, 58 Am. Rep. 638. And see Price v. Richmond & D. R. Co. 38 S. C. 199.

[10] People v. Barber, 115 N. Y. 475; Morrison v. Maciline, 24 Scotch Sess. Cas. 626.

[11] Sanchez v. People, 22 N. Y. 147.

no information peculiarly within the knowledge of an expert.[1] So, it is not for an expert witness to testify whether particular conduct not in itself irrational is prompted by an insane delusion.[2] Nor can he be asked if rational conduct and coherent conversation are not the best evidence of a lucid interval, especially where such conduct and conversation relate to the subject of the delusion; he should be asked whether a given state of facts tends to prove delusion or insanity.[3] And it is not proper to ask experts to define words which have a fixed and well-known signification, such as monomania, except perhaps upon cross-examination.[4] So, questions asked a medical expert extending over an almost unlimited field of inquiry, involving a discussion of the law of insanity in all its phases, are objectionable as consuming the time of the court and tending to confuse and mislead the jury.[5] And he cannot be asked to state whether the evidence introduced by the defendant, in connection with the evidence introduced by the plaintiff, indicates to him that there was a lucid interval at the time of the act in question.[6] Nor can counsel be permitted to read from a medical journal to an expert and ask him whether he concurred in the views there expressed, though he may use it in framing questions to the jury.[7] An opinion that a man suffering from delirium tremens has no more control over his actions than a man suffering from any other delirium, but that he is still sane, is inadmissible as directly opposed to the established legal rule.[8] And the admission of an opinion that certain acts were evidence of delirium is harmless error where it is common knowledge that such acts were not evidence of delirium but of its absence.[9]

§ 7. *Cross-examination of experts.*

After expert witnesses have given their opinions as to sanity or insanity upon the direct examination, inquiries may be put to

[1] Van Zandt v. Mutual Ben. L. Ins. Co. 55 N. Y. 169, 14 Am. Rep. 215.
[2] State v. Scott, 41 Minn. 365.
[3] Rush v. Megee, 36 Ind. 69.
[4] Goodwin v. State, 96 Ind. 550.
[5] Dejarnette v. Com. 75 Va. 867.
[6] Rush v. Megee, 36 Ind. 69.
[7] State v. Coleman, 20 S. C. 441.
[8] French v. State, 93 Wis. 325.
[9] McHugh v. Fitzgerald, 103 Mich. 21.

them upon cross-examination tending to test their skill and capacity and the correctness of their conclusions, and they may be asked whether certain facts already sworn to did not furnish evidence of insanity,[1] or whether or not certain hypothetical facts would indicate it.[2] And the cross-examining party is not confined to the use of the same hypothetical questions as had been used on direct examination.[3] But the expert may be asked an opinion on any other state of facts assumed by him to have been proved, or upon a hypothetical case based upon such facts.[4] Thus, a witness in a criminal prosecution who had testified to certain facts in the history of the accused having a tendency to bring on a diseased condition of the brain may be asked by the state on cross-examination what would be the effect in his opinion of the injuries described, both as a means of testing his capacity and for the purpose of eliciting further facts.[5] And a witness who has given his opinion that the accused was insane may be asked on cross-examination whether in his opinion he knew right from wrong and that it would be wrong for him to commit the act,[6] or whether he had not expressed a contrary opinion.[7] And it is proper upon cross-examination in a proceeding in the nature of a writ *de lunatico inquirendo* to show that an expert witness testifying against the alleged lunatic obtained admission to her house by fraudulent means without her consent to qualify himself as a witness.[8] So, expert witnesses may be cross-examined on purely imaginary and abstract questions assuming facts and theories which may or may not have any foundation in the evidence,[9] the allowance of such questions resting in the sound discretion of the court,[10] which cannot be reviewed when fairly exercised.[11] And refusal to permit

[1] People v. Lake, 12 N. Y. 358.
[2] People v. Sutton, 73 Cal. 243.
[3] Foster v. Dickerson, 64 Vt. 233.
[4] Grubb v. State, 117 Ind. 277; People v. Lake, 12 N. Y. 358; Davis v. State, 35 Ind. 496, 9 Am. Rep. 760.
[5] State v. Reddick, 7 Kan. 143.
[6] Clark v. State, 12 Ohio, 483, 40 Am. Dec. 481.
[7] Montgomery v. Com. 88 Ky. 509.
[8] Re Mason, 60 Hun, 46.
[9] Bever v. Spangler, 93 Iowa, 576.
[10] Bever v. Spangler, 93 Iowa, 576; People v. Augsbury, 97 N. Y. 501.
[11] People v. Augsbury, 97 N. Y. 501.

an expert who had declared his opinion as to the existence of recurrent insanity to state whether he could give any illustration of recurrent insanity which had come within his own personal experience is not reversible error.[1]

But expert witnesses cannot be asked hypothetical questions on cross-examination where the hypothesis is wholly unsupported by evidence.[2] And it is improper to select a few facts which tend naturally to show sanity, and ask the witness whether they change his opinion; all the facts bearing upon the question should be included.[3] And where the direct examination was limited to expressions of opinion as to the correctness of the theory of an expert called by the opposite party, the witness cannot be asked a hypothetical question on cross-examination when his answer if it sustains the opposite party's views would have sustained a part of his case.[4] Neither can an expert be asked on cross-examination why and for what purpose he examined the person whose sanity was in question,[5] though objection to hypothetical questions on cross-examination is waived if not taken at the time.[6] So, a question asked an expert witness upon re-examination in a will contest in which insanity is alleged without repeating, and which does not include the hypothesis stated upon the direct and cross-examination, is legitimate and will be sustained as resting upon the hypothesis thus stated, where such hypothesis had been already referred to in questions previously asked him.[7] And requiring the accused in a criminal prosecution to submit his hypothetical case to medical experts before the state's rebutting evidence on the question of sanity is given is not error, as he may, upon application to the court after the state has finished, re-examine them upon the additional evidence.[8]

[1] Leache v. State, 22 Tex. App. 279, 58 Am. Rep. 638.
[2] Kearney v. State, 68 Miss. 233.
[3] Prentis v. Bates, 88 Mich. 567.
[4] Gridley v. Boggs, 62 Cal. 190.
[5] Hall v. Com. 22 W. N. C. 25.
[6] Wheelock v. Godfrey, 100 Cal. 578.
[7] McGinniss v. Kempsey, 27 Mich. 363.
[8] Dove v. State, 3 Heisk. 348.

§ 8. *General rule as to non expert opinions.*

The unsupported opinion of a witness with relation to the sanity or insanity of a person is not admissible in evidence.[1] And non expert witnesses cannot give their opinion as to the sanity or insanity of a person based upon evidence given by other witnesses;[2] nor can they be asked hypothetical questions on the question of sanity or insanity based upon facts not within their knowledge,[3] even upon cross-examination.[4] As a general rule, however, the opinions of nonexpert witnesses upon the question of sanity or insanity are admissible in evidence when based upon facts, circumstances, or conversations with the person within their own knowledge and observation to which they testify. This rule has been laid down generally.[5] And it is applied in prosecutions

[1] Grant v. Thompson, 4 Conn. 203, 10 Am. Dec. 119; Armstrong v. State, 30 Fla. 170, 17 L. R. A. 484; Turner v. Cook, 36 Ind. 129; Kenworthy v. Williams, 5 Ind. 375; Shirleys v. Taylor, 5 B. Mon. 99; Hunt v. Hunt, 3 B. Mon. 575; Godden v. Burke, 35 La. Ann. 160; Townshend v. Townshend, 7 Gill, 10; Stewart v. Redditt, 3 Md. 67; Re Pinney, 27 Minn. 280; Hyer v. Little, 20 N. J. Eq. 443; Rambler v. Tryon, 7 Serg. & R. 90, 10 Am. Dec. 444; Puryear v. Reese, 6 Coldw. 21; Gibson v. Gibson, 9 Yerg. 329; McCurry v. Hooper, 12 Ala. 823; Bowling v. Bowling, 8 Ala. 538; Dicken v. Johnson, 7 Ga. 484.

[2] State v. Klinger, 46 Mo. 224; Morse v. Crawford, 17 Vt. 502, 44 Am. Dec. 349.

[3] Dunham's Appeal, 27 Conn. 192; Pittard v. Foster, 12 Ill. App. 132; Rice v. Rice, 50 Mich. 448, 53 Mich. 432; State v. Klinger, 46 Mo. 224; St. Louis Mut. L. Ins. Co. v. Graves, 6 Bush, 268.

[4] Dunham's Appeal, 27 Conn. 192; Pittard v. Foster, 12 Ill. App. 132.

[5] Florey v. Florey, 24 Ala. 241; People v. Sanford, 43 Cal. 29; Grant v. Thompson, 4 Conn. 203, 10 Am. Dec. 119; Armstrong v. State, 30 Fla. 170, 17 L. R. A. 484; Fielder v. Collier, 13 Ga. 496; Dicken v. Johnson, 7 Ga. 484; Foster v. Brooks, 6 Ga. 290; Hamrick v. State, 134 Ind. 324; State, Nave, v. Newlin, 69 Ind. 108; Butler v. St. Louis L. Ins. Co. 45 Iowa, 93; Smith v. Hickenbottom, 57 Iowa, 733; Pelamourges v. Clark, 9 Iowa, 1; Baughman v. Baughman, 32 Kan. 538; Phelps v. Com. 17 Ky. L. Rep. 706; Godden v. Burke, 35 La. Ann. 160; Fayette v. Chesterville, 77 Me. 28, 52 Am. Rep. 741; Stewart v. Redditt, 3 Md. 67; Chase v. Winans, 59 Md. 475; Waters v. Waters, 35 Md. 531; Sharp v. Kansas City Cable R. Co. 114 Mo. 94; Farrell v. Brennan, 32 Mo. 328, 82 Am. Dec. 137; Crowe v. Peters, 63 Mo. 429; Reed v. State, 62 Miss. 405; Hay v. Miller, 48 Neb. 156; Genz v. State, 58 N. J. L. 482; Carpenter v. Hatch, 64 N. H. 573; McRae v. Malloy, 93 N. C. 154; McLeary v. Norment, 84 N. C. 235; Price v. Richmond & D. R. Co. 38 S. C. 199; Haney v. Clark, 65 Tex. 93; Garrison v. Blanton,

for the commission of crime in which insanity is alleged as a defense.[1] And nonexperts, as well as experts, may give their opinion as to whether a person accused of theft is afflicted with kleptomania, where most of the symptoms of the disease are testified to by them, and most of his thefts, and his propensity to steal, were noticed among those who knew him.[2] And the absence of witnesses who would give opinions as to the sanity of the accused based upon their association with him and their observation of his conduct, language, and appearance, is a sufficient ground for a continuance,[3] though there were other witnesses who gave similar opinions, where the witnesses in question had better means of knowing the condition of the accused.[4]

So, the same rule is applied in contract actions in which the insanity of a party is alleged.[5] And to actions upon deeds claimed

48 Tex. 299; Hathaway v. National L. Ins. Co. 48 Vt. 336; Cram v. Cram, 33 Vt. 15; Westmore v. Sheffield, 56 Vt. 239; Morse v. Crawford, 17 Vt. 499, 44 Am. Dec. 349; State v. Maier, 36 W. Va. 757; Kilgore v. Cross, 1 Fed. Rep. 582. And see State v. Ryan, cited in 1 Jarman on Wills, 122, note; Clary v. Clary, 2 Ired. L. 78; State v. Stickley, 41 Iowa, 232; Sutherland v. Hankins, 56 Ind. 343; Rush v. Megee, 36 Ind. 69; Ryman v. Crawford, 86 Ind. 262; Wilkinson v. Pearson, 23 Pa. 117.

[1] Norris v. State, 16 Ala. 776; Bolling v. State, 54 Ark. 588; Smith v. State, 55 Ark. 259; People v. Wreden, 59 Cal. 396; People v. Sanford, 43 Cal. 29; Choice v. State, 31 Ga. 424; Berry v. State, 10 Ga. 512; Jamison v. People, 145 Ill. 357; Upstone v. People, 109 Ill. 169; Goodwin v. State, 96 Ind. 550; State, Nave, v. Newlin, 69 Ind. 108; State v. Winter, 72 Iowa, 627; Phelps v. Com. 17 Ky. L. Rep. 706; People v. Finley, 38 Mich. 482; Reed v. State, 62 Miss. 405; Wood v. State, 58 Miss. 741; State v. Bryant, 93 Mo. 273; State v. Erb, 74 Mo. 199; State v. Klinger, 46 Mo. 224; Baldwin v. State, 12 Mo. 233; Territory v. Roberts, 9 Mont. 12; Territory v. Hart, 7 Mont. 489; Polin v. State, 14 Neb. 540; Schlencker v. State, 9 Neb. 241; State v. Potts, 100 N. C. 457; Clark v. State, 12 Ohio, 483, 40 Am. Dec. 481; Com. v. Gerade, 145 Pa. 289; Taylor v. Com. 109 Pa. 262; Dove v. State, 3 Heisk. 348; Holcomb v. State, 41 Tex. 125; Thomas v. State, 40 Tex. 60; Ellis v. State, 33 Tex. Crim. Rep. 86; Webb v. State, 5 Tex. App. 596; McClackey v. State, 5 Tex. App. 320; Campbell v. State, 10 Tex. App. 560; State v. Hayden, 51 Vt. 296; State v. Maier, 36 W. Va. 757; United States v. Holmes, 1 Cliff. 98; Reg. v. Oxford, 9 Car. & P. 525; Rex v. Dyson, 7 Car. & P. 305.

[2] Harris v. State, 18 Tex. App. 287.

[3] Webb v. State, 5 Tex. App. 596; Harris v. State, 18 Tex. App. 287.

[4] Harris v. State, 18 Tex. App. 287.

[5] Beller v. Jones, 22 Ark. 92; Stewart v. Spedden, 5 Md. 433; Chickering

to be invalid because of the insanity of the grantor.[1] So, evidence in a will contest on the question of testamentary capacity or incapacity is governed by the same rule.[2] And a witness in a will contest who had a business transaction with the testator which he gave in detail may testify whether anything occurred at the time which indicated a want of understanding on the part of the testator as to the business in which he was engaged, and whether he saw anything that indicated mental derangement, and as to his opinion as to his mental condition.[3] Such opinions as to mental capacity are admissible if the witnesses knew and had an opportunity to observe the testator.[4] And where the witnesses were with the testator during his last illness their opinions, accompanied by the facts on which they were

v. Brooks, 61 Vt. 554; Cram v. Cram, 33 Vt. 15; Burnham v. Mitchell, 34 Wis. 117; Kilgore v. Cross, 1 Fed. Rep. 578.

[1] Woodcock v. Johnson, 36 Minn. 217; Frizzel v. Reed, 77 Ga. 724; DeWitt v. Barly, 17 N. Y. 340, 13 Barb. 550; Brand v. Brand, 39 How. Pr. 193; Culver v. Haslam, 7 Barb. 314; Barker v. Pope, 91 N. C. 165; Clary v. Clary, 2 Ired. L. 78; Elcessor v. Elcessor, 146 Pa. 359; Parkhurst v. Horsford, 21 Fed. Rep. 829.

[2] Fountain v. Brown, 38 Ala. 72; Abraham v. Wilkins, 17 Ark. 292; Kelly v. McGuire, 15 Ark. 555; Re Carpenter, 79 Cal. 383; Brooks's Estate, 54 Cal. 471; Shanley's Appeal, 62 Conn. 325; Dunham's Appeal, 27 Conn. 192; Ethridge v. Bennett, 9 Houst. (Del.) 295; Jamison v. Jamison, 3 Houst. (Del.) 108; Dennis v. Weekes, 51 Ga. 24; Walker v. Walker, 14 Ga. 242; Potts v. House. 6 Ga. 324, 1 Am. Dec. 329; Keithley v. Stafford, 126 Ill. 507; American Bible Soc. v. Price, 115 Ill. 623; Roe v. Taylor, 45 Ill. 485; Pittard v. Foster, 12 Ill. App. 132; Leach v. Prebster, 39 Ind. 492; Re Goldthorp, 94 Iowa, 336; Denning v. Butcher, 91 Iowa, 425; Re Norman, 72 Iowa, 84; Hunt v. Hunt, 3 B. Mon. 577; Williams v. Lee, 47 Md. 321; Martin v. Perkins, 56 Miss. 204; Re Pinney, 27 Minn. 280; Hardy v. Merrill, 56 N. H. 227, 22 Am. Rep. 441; Bost v. Bost, 87 N. C. 477; Newhard v. Yundt, 132 Pa. 324; Swails v. White, 149 Pa. 261; Shaver v. McCarthy, 110 Pa. 339; Titlow v. Titlow, 54 Pa. 216; Wogan v. Small, 11 Serg. & R. 141; Rambler v. Tryon, 7 Serg. & R. 90, 10 Am. Dec. 444; Puryear v. Reese, 6 Coldw. 21; Gibson v. Gibson, 9 Yerg. 329; Brown v. Mitchell, 87 Tex. 140, 75 Tex. 9; Cockrill v. Cox, 65 Tex. 676; Foster v. Dickerson, 64 Vt. 233; Fishburne v. Ferguson, 84 Va. 87; Harrison v. Rowan, 3 Wash. C. C. 580; Tatham v. Wright, 2 Russ. & M. 1.

[3] Rice v. Rice, 53 Mich. 432.

[4] Wise v. Foote, 81 Ky. 10.

founded, are competent on the question of his physical power to execute his will or to request another to sign it for him.[1]

So, the opinion of nonexpert witnesses as to the mental condition of an insured person upon an issue as to his sanity at the time of committing suicide are admissible in connection with statements of the facts and circumstances within their personal knowledge upon which their opinions are based.[2] And evidence on an issue as to the soundness or unsoundness of the mind of one for whom a trust had been created, and whether the trust had been executed, to the effect that the witness had known him from birth and that he was not of unsound mind and capable of managing his property, is competent and admissible.[3] Such opinions are admissible on the question of sanity or insanity from necessity, for the reason that the minute appearances upon which they may depend cannot be so perfectly described as to enable a jury to draw a just conclusion therefrom;[4] and because their observation may have conveyed to them little indefinable and almost imperceptible actions and perceptions which language cannot adequately describe,[5] and which from their nature and number it would be impossible to bring before the jury,[6] upon the theory that from the nature of the subject under investigation no better evidence could be obtained.[7] And opinions of witnesses that a person is sane or insane or incapable of doing one thing or another is not objectionable as usurping the province of the jury.[8]

But the general rule, upheld by the weight of authority, is that a witness cannot give his opinion upon the question of sanity or insanity unless he states the facts on which his opinion is predicated,[9] the opinions of the witnesses being merely preliminary to

[1] Blocher v. Hostetter, 2 Grant, Cas. 288.

[2] Connecticut Mut. L. Ins. Co. v. Lathrop, 111 U. S. 612, 28 L. ed. 536; Charter Oak L. Ins. Co. v. Rodel, 95 U. S. 235, 24 L. ed. 433; Hathaway v. National L. Ins. Co. 48 Vt. 336.

[3] Obear v. Gray, 73 Ga. 455.

[4] DeWitt v. Barly, 17 N. Y. 340.

[5] Clifton v. Clifton, 47 N. J. Eq. 227.

[6] Pelamourges v. Clark, 9 Iowa, 1.

[7] Brown v. Com. 14 Bush, 398.

[8] Beaubien v. Cicotte, 12 Mich. 469.

[9] Grubb v. State, 117 Ind. 277; Goodwin v. State, 96 Ind. 550; Rarick v. Ulmer, 144 Ind. 25; Colee v. State, 75 Ind. 513; Grant v. Thompson, 4

the further inquiry as to the facts and circumstances upon which it is based;[1] and that such opinions are inadmissible unless accompanied by statements of the facts and circumstances upon which they are founded.[2] And the court may permit cross-examination of the witness before permitting him to give his opinion.[3]

So, a prosecuting witness in a prosecution for murder cannot be asked on cross-examination whether he believed the accused intended to shoot him, where it does not appear that he had any means of judging as to his intention.[4] Nor is an affidavit on application for a continuance in a criminal case, stating that absent nonexpert witnesses will swear to unsoundness of mind, but not giving the specific facts indicating insanity upon which their opinions are based, sufficient.[5]

Conn. 203, 10 Am. Dec. 119; State v. Pennyman, 68 Iowa, 216; Hunt v. Hunt, 3 B. Mon. 575; Eloi v. Eloi, 36 La. Ann. 563; State v. Coleman, 27 La. Ann. 691; Rice v. Rice, 50 Mich. 448, 53 Mich. 432; Lynch v. Doran, 95 Mich. 395; Sheehan v. Kearney (Miss.) 35 L. R. A. 102; State v. Klinger, 46 Mo. 224; Shaver v. McCarthy, 110 Pa. 339; First Nat. Bank v. Wirebach, 12 W. N. C. 150; Wilcox v. State, 94 Tenn. 106; Ellis v. State, 33 Tex. Crim. Rep. 86; Foster v. Dickerson, 64 Vt. 233; Re Blood, 62 Vt. 359; State v. Brooks, 4 Wash. 328; Armstrong v. State, 30 Fla. 170, 17 L. R. A. 484; Re Pinney, 27 Minn. 280; Murphree v. Senn, 107 Ala. 424; Hoover v. State, 48 Neb. 184; Sagar v. Hogmire (Mich.) 2 Det. L. N. 894.

[1] Garrison v. Garrison, 15 N. J. Eq. 266.

[2] Roberts v. Trawick, 13 Ala. 68; Bowling v. Bowling, 8 Ala. 538; Jamison v. Jamison, 3 Houst. (Del.) 108; Bowden v. Achor, 95 Ga. 243; Dicken v. Johnson, 7 Ga. 492; Potts v. House, 6 Ga. 324, 1 Am. Dec. 329; Jamison v. People, 145 Ill. 357; Burkhart v. Gladish, 123 Ind. 338; Doe, Sutton, v. Reagan, 5 Blackf. 217, 33 Am. Dec. 466; Pelamourges v. Clark, 9 Iowa, 1; Shirleys v. Taylor, 5 B. Mon. 99; Godden v. Burke, 35 La. Ann. 160; Waters v. Waters, 35 Md. 531; Dorsey v. Warfield, 7 Md. 65; Townshend v. Townshend, 7 Gill, 10; Needham v. Ide, 5 Pick. 510; White v. Bailey, 10 Mich. 165; Prentis v. Bates, 93 Mich. 234, 17 L. R. A. 494; State v. Crisp. 126 Mo. 605; Culver v. Haslam, 7 Barb. 314; Brand v. Brand, 39 How. Pr. 193; State v. Murray, 11 Or. 413; State v. Abrams, 11 Or. 169; Doran v. McConlogue, 150 Pa. 98; First Nat. Bank v. Wirebach, 106 Pa. 37; Dickinson v. Dickinson, 61 Pa. 401; Stokes v. Miller, 10 W. N. C. 241; Anderson v. Cranmer, 11 W. Va. 562; Yanke v. State, 51 Wis. 464. But see Williams v. Lee, 47 Md. 321; Van Huss v. Rainbolt, 2 Coldw. 139.

[3] O'Connor v. Madison, 98 Mich. 183.

[4] State v. Garvey, 11 Minn. 154.

[5] Warner v. State, 114 Ind. 137; Mendiola v. State, 18 Tex. App. 462.

A number of the cases, however, have seemed to treat the failure to state the facts and circumstances upon which the opinion is based as going to the weight rather than to the admissibility of the evidence, stating the rule to be that such opinions as to sanity or insanity are entitled to little or no weight unless facts and circumstances clearly warranting them are given,[1] such evidence, except so far as it is based on facts and occurrences detailed by the witnesses, being regarded as the poorest kind of evidence.[2] And that the fact that a witness having an opportunity to form a correct judgment is unable to state the circumstances upon which his opinion is based, or that the circumstances stated did not justify the opinion, does not warrant the court in excluding it as evidence or instructing the jury to disregard it.[3]

Where a witness has stated circumstances upon which an opinion as to the sanity of another might be predicated, however, he may afterwards give his opinion without repeating such circumstances in connection with it.[4] Nor is it necessary that a nonexpert witness should accompany his opinion with the facts upon which it is based where he testifies to the sanity of the party, as in such case there may be no abnormal acts to be stated.[5] And one who has been extremely intimate with the person whose sanity is in question all his life, having many opportunities for judging as to his mind, may give his opinion as to mental capacity, though he has not stated facts in his testimony upon which he bases it.[6] Nor will the failure to show that nonexpert witnesses had any correct understanding of the true criterion of testamentary capacity furnish any objection to a finding and judgment in a will contest based upon their testimony, where they gave their opinions without objection and without being required to state

[1] Kinne v. Kinne, 9 Conn. 102, 21 Am. Dec. 732; Chase v. Winans, 59 Md. 475; Beaubien v. Cicotte, 12 Mich. 459; Clifton v. Clifton, 47 N. J. Eq. 227; Sloan v. Maxwell, 3 N. J. Eq. 563; Lowe v. Williamson, 2 N. J. Eq. 82.

[2] Whitenack v. Stryker, 2 N. J. Eq. 8.

[3] Stubbs v. Houston, 33 Ala. 555.

[4] People v. Borgetto, 99 Mich. 336.

[5] Ford v. State, 71 Ala. 385.

[6] Weems v. Weems, 19 Md. 334; Newcomb v. Newcomb, 16 Ky. L. Rep. 376.

the grounds therefor.[1] And the objection that facts were not stated cannot be first taken on appeal.[2]

The opinion of a witness as to the mental capacity of the person accused of crime is not admissible, however, when offered, not for the purpose of proving him *compos mentis*, but as a measure of his intellectual capacity.[3] And the previously expressed opinion of the person killed is not admissible on the question of the sanity of the accused upon a prosecution for such killing.[4] Nor can a nonexpert witness who had testified to facts tending to show that a party to a contract was incompetent, be contradicted by showing that he had done acts indicating that he considered such party to be of sound mind,[5] though a witness who has given his opinion that a testator was of sound mind may be asked upon cross-examination by way of impeachment if he had stated out of court that the testator was childish and going crazy.[6] And where such witness testifies to facts showing the insanity of the testator, and proof is made of declarations at other times that in the opinion of the witnesses the testator was sane, such opinions may be considered by the jury with the other evidence in chief on the question of the testator's sanity.[7]

§ 9. *Exceptions to the general rule.*

Some of the cases have refused to regard the question of insanity as an exception to the rule, excluding the opinions of nonexpert witnesses; and the rule has been laid down by the courts of Maine, Massachusetts, New Hampshire, and New York that the opinions of witnesses who are not experts are not admissible in evidence upon the question of the mental capacity of a person, though given in connection with the facts and circumstances relied on to prove incapacity, and though the witnesses were personally acquainted with him and had had opportunity to learn the quality

[1] Appleby v. Brock, 76 Mo. 314.
[2] State v. Murray, 11 Or. 413.
[3] Patterson v. People, 46 Barb. 625.
[4] Lake v. People, 1 Park. Crim. Rep. 495.
[5] Hubbell v. Bissell, 2 Allen, 196.
[6] Staser v. Hogan, 120 Ind. 227.
[7] Ware v. Ware, 8 Me. 42.

of his mind.[1] Their evidence must consist of the acts and declarations of a person evincing a want of capacity, leaving it to the jury to say what inference shall be drawn from the testimony given.[2] In New Hampshire, however, this doctrine has been repudiated, and the general rule with reference to insanity has been adopted.[3] Under the rule as applied in Massachusetts a nonexpert witness who has testified that a testator has failed mentally and physically, and that he has noticed a decided change in his intelligence, cannot be asked whether from his general appearance he considered him capable of making a contract or transacting important business.[4] And a witness who had seen a testator shortly before and shortly after a shock of paralysis which is alleged to have caused his incompetency cannot be asked what were his condition and appearance with regard to conduct and conversations at the last interview as compared with those at a former one, as it might be understood by the witness as calling for his opinion as to his mental condition.[5] Nor can the opinion of an attesting witness who is not an expert be given as to the strength of mind required to comprehend a clause in the will creating charitable trusts, and as to whether the testator had sufficient strength of mind to comprehend it.[6]

But evidence by a nonexpert that he observed no incoherence of thought in the testator, or anything unusual or singular with respect to his mental condition, is admissible, as it is not the giv-

[1] Wyman v. Gould, 47 Me. 159; Cowles v. Merchant, 140 Mass. 377; Hastings v. Rider, 99 Mass. 622; Com. v. Fairbanks, 2 Allen, 511; Com. v. Wilson, 1 Gray, 339; State v. Archer, 54 N. H. 465; State v. Pike, 49 N. H. 399, 6 Am. Rep. 536; Boardman v. Woodman, 47 N. H. 120; Hamblett v. Hamblett, 6 N. H. 333; People v. Fish, 125 N. Y. 136; Holcomb v. Holcomb, 95 N. Y. 316; Re Ross, 87 N. Y. 514; Hewlett v. Wood, 55 N. Y. 634; Real v. People, 42 N. Y. 270; O'Brien v. People, 36 N. Y. 276, 48 Barb. 278; Clapp v. Fullerton, 34 N. Y. 190, 90 Am. Dec. 681; Dewitt v. Barley, 9 N. Y. 371; Re Klock, 49 Hun, 450; Re Arnold, 14 Hun, 525; Howell v. Taylor, 11 Hun, 214; Rollwagen v. Rollwagen, 3 Hun, 121; Sears v. Shafer, 1 Barb. 408; Re Rapplee, 66 Hun, 558.

[2] State v. Pike, 49 N. H. 399, 6 Am. Rep. 533; Sears v. Shafer, 1 Barb. 408; Re Rapplee, 66 Hun, 558.

[3] Hardy v. Merrill, 56 N. H. 227, 22 Am. Rep. 441.

[4] Smith v. Smith, 157 Mass. 389.

[5] Ellis v. Ellis, 133 Mass. 469.

[6] Melanefy v. Morrison, 152 Mass. 473.

ing of an opinion as to the condition of his mind but only a statement of its manifestation as observed by him.[1] And nonexperts may testify to the appearance of the testator, and to any particular thing from which the state of his mind might be inferred aside from their opinion and judgment upon the question.[2] Any witness of ordinary intelligence, who is familiarly acquainted with another, may testify whether within a given time he has failed mentally or physically, and whether he noticed any difference in his mode of doing business.[3] And such a witness may be asked whether he had observed any facts which led him to infer that there was any derangement of intellect.[4] And permitting a witness to add to his negative answers to questions as to whether he had heard certain statements about the mental condition of another, to the effect that he had never thought of such a thing as the person being insane because it was not true, furnishes no ground for exception.[5] So, in Maine the opinion of witnesses testifying to facts showing incapacity, who had been impeached by proof of declarations made at other times, that in their opinion the testator was sane, may be considered with the other evidence in chief as tending to prove capacity,[6] though they can only state how the party appeared with reference to soundness or unsoundness of mind.[7]

Under the New York rule a nonexpert cannot testify in a will contest as to the impressions made upon him by the acts and sayings of the testator as to whether his mind or memory was failing,[8] though he may testify generally as to impressions produced upon him by what he has witnessed.[9] And the opinions of witnesses cannot be given as to what construction they placed upon certain motions and the meaning of certain sounds uttered by him.[10] Nor can an expert witness be permitted to testify that the maker of

[1] Nash v. Hunt, 116 Mass. 237.
[2] Poole v. Richardson, 3 Mass. 330.
[3] Com. v. Brayman, 136 Mass. 438.
[4] McConnell v. Wildes, 153 Mass. 487; May v. Bradlee, 127 Mass. 414.
[5] Nash v. Hunt, 116 Mass. 238.
[6] Ware v. Ware, 8 Me. 42.
[7] Wyman v. Gould, 47 Me. 159.
[8] Lawrence v. Lawrence, 4 N. Y. Week. Dig. 293.
[9] Clapp v. Fullerton, 34 N. Y. 190.
Rollwagen v. Rollwagen, 5 Thomp. & C. 402.

an assignment was imbecile or that his mind was gone;[1] or as to whether a grantor was rational or irrational,—though such opinion is based upon specific acts, conversation, and personal observation.[2] Nor are opinions as to the mental capacity of a testator rendered competent by the fact that the witness was a subscribing witness to the will, where the inquiry is not limited to the time of its execution.[3] And refusal to permit a witness to a will to state whether there was anything in the testator's manners or appearance different from what he had seen for the past year is not a violation of the rule that a subscribing witness can give his opinion generally as to soundness of mind where the witnesses had not described the manner and appearance of the testator, but had merely stated the conversations had with him and what was done.[4] Nonexpert witnesses who are examined as to facts within their own knowledge and observation tending to show the soundness or unsoundness of a person's mind, however, may characterize as rational or irrational the acts, conduct, and declarations to which they testify, limiting their testimony to conclusions from the facts disclosed;[5] though such inquiries do not fall within the province of mere cross-examination.[6] And the admission in evidence in a will contest of the opinions of nonexpert witnesses on the general question of testamentary capacity, though erroneous, does not require a reversal where the facts given in evidence were competent and plainly sufficient to uphold the determination.[7] So, evidence in a prosecution for homicide as to whether the witnesses would regard the actions of the accused as irrational, if he were nervous and irritable after divorce papers had been served upon him, is admissible as tending to characterize and develop

[1] Holcomb v. Holcomb, 95 N. Y. 316.

[2] Paine v. Aldrich, 133 N. Y. 544.

[3] Re McCarthy, 55 Hun, 7.

[4] Petrie v. Petrie, 25 N. Y. S. R. 309.

[5] Paine v. Aldrich, 133 N. Y. 544; People v. Packenham, 113 N. Y. 200; People v. Conroy, 97 N. Y. 67; Holcomb v. Holcomb, 95 N. Y. 316; Re Ross, 87 N. Y. 514; Rider v. Miller, 86 N. Y. 507; Hewlett v. Wood, 55 N. Y. 634; Clapp v. Fullerton, 34 N. Y. 190; Howell v. Taylor, 11 Hun, 214; Re Klock, 49 Hun, 450.

[6] Rollwagen v. Rollwagen, 5 Thomp. & C. 402.

[7] Clapp v. Fullerton, 34 N. Y. 190.

the weight to be given his evidence on his direct examination.[1] And the admission in evidence in a will contest of a deposition taken in another state containing the opinions of nonexpert witnesses is not error where the parties had agreed that they would not object to evidence taken under the commission except as noted on the return, and no objections were noted to such evidence.[2]

So, the opinion was expressed in a Texas case that it would be better practice, as a general rule, to confine nonexpert witnesses to the statement of demonstrations which indicate insanity, and leave the jury to form their own opinion.[3] But this statement was *obiter* and the general rule stated in a preceding section has been adopted in that state.[4]

§ 10. *Who may give.*

The rule is laid down generally that anyone who had an opportunity of knowing and observing a person whose sanity is impeached may give his opinion as to his mental capacity, whether he was an attesting witness or not.[5] And this rule has been applied to persons who were parties to the suit,[6] to legatees,[7] and to contestants of a will,[8] and to a guardian of a testatrix,[9] to brothers,[10] to daughters,[11] and to a wife, with relation to the mental condition of her husband.[12] And the divorced wife of a person accused of crime may testify as to whether from her association with him she ever saw anything that would indicate that he was a man of unsound mind, without violating the rule which protects the privacy and confidence of the marriage relation.[13] So, an administrator who had been the family physician

[1] People v. Osmond, 138 N. Y. 80.
[2] Re Bull, 14 Daly, 510.
[3] Hickman v. State, 38 Tex. 190.
[4] See *supra*, § 8.
[5] Doe, McDougald, v. McLean, Winst. L. pt. 1, p. 120.
[6] Severin v. Zack, 55 Iowa, 28.
[7] Burkhart v. Gladish, 123 Ind. 338; Staser v. Hogan, 120 Ind. 227.
[8] Williams v. Williams, 90 Ky. 28.
[9] Howard v. Coke, 7 B. Mon. 655.
[10] Weems v. Weems, 19 Md. 334.
[11] Moore v. Moore, 67 Mo. 192.
[12] Haney v. Clark, 65 Tex. 93; Burnham v. Mitchell, 34 Wis. 117.
[13] United States v. Guiteau, 1 Mackey, 498.

of a testator for years may testify as a witness for himself on the trial of an application to sell lands for the payment of debts in which the issue was as to the validity of a promissory note signed by the intestate, as to his general insanity, and state the facts upon which his opinion was founded.[1] Testimony of a daughter of a person who had made a promissory note to take effect after death, in an action upon the note, as to her opinion as to his capacity to make a contract, however, is not admissible under statutory prohibitions as to testimony in relation to a personal transaction or communication with a deceased person.[2] And an administrator cannot testify in an action upon a note made by the intestate as to the condition of his mind at the time it was given under a statutory provision prohibiting testimony as to any transaction with or statement by the deceased.[3] And it has been held that one who would inherit a part of a testator's property but for his will is incompetent to give his opinion as to his capacity to make it.[4] And that daughters of a testator are not competent witnesses on their own behalf to prove the insanity of their father at and prior to the time he executed his last will, upon a bill in equity to contest its validity.[5]

§ 11. *The acquaintance necessary.*

The rule is generally stated that a nonexpert witness may give his opinion as to the sanity or insanity of another where he is well acquainted with him,[6] or where he had been long and intimately acquainted with him,[7] or where he had frequent or adequate opportunities for observing him and judging as to his mental capacity;[8] but that such evidence could not be given by

[1] Davis v. Tarver, 65 Ala. 98.

[2] Ducker v. Whitson, 112 N. C. 44. And see Re Eysaman, 113 N. Y. 62, 3 L. R. A. 599.

[3] Davis v. Tarver, 65 Ala. 98.

[4] Kerr v. Lunsford, 31 W. Va. 680, 2 L. R. A. 668.

[5] Brace v. Black, 125 Ill. 33.

[6] Territory v. Roberts, 9 Mont. 12; Price v. Richmond & D. R. Co. 38 S. C. 199; State v. Maier, 36 W. Va. 757.

[7] Fountain v. Brown, 38 Ala. 72; Williams v. Lee, 47 Md. 321; Polin v. State, 14 Neb. 540.

[8] Shanley's Appeal, 62 Conn. 325; Brooks's Estate, 54 Cal. 471; People v. Sanford, 43 Cal. 29; Keithley v. Stafford, 126 Ill. 527; Jamison v. People,

one who had no opportunities for forming an opinion.[1] And that it is admissible only where he has an adequate opportunity to observe the conduct and appearance of the person to whom insanity is imputed, and when his judgment is based upon personal observation of his appearance, habits, manner, and conduct.[2] The rule definitely stated would seem to be that the acquaintance and intimacy must have been such as to justify the conclusion that the witness had formed a correct judgment as to the mental status and habits of the person whose sanity is questioned.[3] There must be something more than mere occasional brief interviews on general or indefinite subjects.[4] The evidence should be such as to apprise the court that the witness may himself believe in the competency or incompetency of the person upon reasonable grounds.[5] And the court may properly require the witness to state all the circumstances upon which his opinion is based before permitting him to state it.[6] Thus, a witness may be permitted to give his opinion as to the mental capacity of another where he has been in the habit of visiting him and was acquainted with his former condition, and could mark any change at the time of the interview,[7] and could make an intelligent comparison between his conduct at that time and when he enjoyed the full use of his mental faculties.[8] And a witness is competent where he grew up with the testator and marked his conduct in infancy, in the

145 Ill. 357; Brown v. Com. 14 Bush, 398; Weems v. Weems, 19 Md. 334; Reed v. State, 62 Miss. 405; State v. Bryant, 93 Mo. 273; Turner v. Kansas City, St. J. & C. B. R. Co. 23 Mo. App. 12; State v. Potts, 100 N. C. 457; Clary v. Clary, 2 Ired. L. 78; Com. v. Gerade, 145 Pa. 289; Bricker v. Lightner, 40 Pa. 199.

[1] State v. Crisp, 126 Mo. 605.

[2] Taylor v. United States, 7 App. D. C. 27.

[3] Moore v. Speir, 80 Ala. 129; Florey v. Florey, 24 Ala. 241; Norris v. State, 16 Ala. 776; Roberts v. Trawick, 13 Ala. 68; Ford v. State, 71 Ala. 385; Re Carmichael, 36 Ala. 514; O'Connor v. Madison, 98 Mich. 183; Wood v. State, 58 Miss. 741; Thomas v. State, 40 Tex. 60. And see Johnson v. Culver, 116 Ind. 278.

[4] Re Carmichael, 36 Ala. 514. And see Eckert v. Flowry, 43 Pa. 46.

[5] People v. Borgetto, 99 Mich. 336.

[6] O'Connor v. Madison, 98 Mich. 183.

[7] Swails v. White, 149 Pa. 261.

[8] Beller v. Jones, 22 Ark. 92.

prime of life, and in his decline;[1] or where he was acquainted with him and had seen him frequently under different circumstances;[2] or where he is shown to have had an intimate acquaintance with him for years and up to the time of the act in question;[3] or where he had known him from childhood and had been intimate with him;[4] or where he had seen and known him for thirty-five years;[5] or where he had known him well for twenty-five years, and had often had dealings with him;[6] or where he had known him for fifteen years, and met and observed him almost daily for six weeks immediately preceding the act in question;[7] or where he had known him intimately for two years, and was with him every day or two;[8] or where he had known him two years, and lived near by and frequently saw him at work when passing his house;[9] or where he had frequent and friendly intercourse with him, and abundant opportunity to observe his condition and note the changes in it during the last year.[10] And it has been held that one who was with a testator and assisted in caring for him during the last three days of his life, and who details his appearance and condition at the time, is sufficiently qualified to express an opinion as to his soundness of mind.[11]

So, a witness is competent to give an opinion as to sanity or insanity where he is a relative of and intimate with the party whose sanity is in question, and had stayed at his house for some time;[12] and so is the daughter of a person who had known him and lived with him all her life and had seen him make contracts, and who saw him immediately after the act in question;[13] or who knew his habits and state of mind and had heard him speak of

[1] Rambler v. Tryon, 7 Serg. & R. 90, 10 Am. Dec. 444.
[2] State v. Hayden, 51 Vt. 296.
[3] State v. Hurst (Idaho) 39 Pac. 554.
[4] Stubbs v. Houston, 33 Ala. 555.
[5] Denning v. Butcher, 91 Iowa, 425.
[6] Townshend v. Townshend, 7 Gill, 10.
[7] Pflueger v. State, 46 Neb. 493.
[8] Stuckey v. Bellah, 41 Ala. 700.
[9] Sage v. State, 91 Ind. 141. And see State v. Geddis, 42 Iowa, 268.
[10] Commonwealth Title Ins. & T. Co. v. Gray, 150 Pa. 255.
[11] Mull v. Carr, 5 Ind. App. 491.
[12] Stuckey v. Bellah, 41 Ala. 700; Florey v. Florey, 24 Ala. 241.
[13] Young v. Wilmington & W. R. Co. 116 N. C. 932.

business affairs.[1] And so is the wife of such person, where she was constantly with him and took care of him and dressed him, and was the means of communication between him and the world.[2] So, one who had long known a person, and was a neighbor, and had often dealt and conversed with him, is competent to give an opinion as to his soundness of mind.[3] And conversations, business dealings, or social intercourses with the person whose sanity is in question, are sufficient to qualify the witnesses.[4] Nonexpert witnesses cannot give their opinions, however, as to the sanity or insanity of a person alleged to have been afflicted with epileptic fits where they have not seen him at all for four months, and have not seen him thus afflicted for seven months.[5] Nor can witnesses who have not conversed with the person for several years and have only observed how he moved about and looked.[6] And a witness who arrested a person accused of crime and took him some distance and turned him over to the authorities cannot give an opinion as to whether he appreciated the character of his act.[7] Nor is a witness sufficiently qualified by testimony that he presided as district judge during a former trial of the offense, and observed the accused during that and the present trial, and examined his eyes, and was familiar with the appearance of insane people;[8] or by proof that he was on the grand jury which visited the jail, after the indictment was found, and that he called the defendant out of his cell and asked him some questions and felt of his head.[9] So, one who had heard the person whose sanity is in question talk, but who paid little attention to what he said, and does not undertake to detail it, cannot give his opinion upon the question of his soundness of mind.[10] Nor is a witness sufficiently qualified by evidence that he saw the person during the week preceding the act in question, where it does not appear how long he had known

[1] Moore v. Moore, 67 Mo. 192.
[2] Burnham v. Mitchell, 34 Wis. 117.
[3] Ryman v. Crawford, 86 Ind. 265.
[4] Goodwin v. State, 96 Ind. 550. And see Re Fenton (Iowa) 66 N. W. 99.
[5] Com. v. Buccieri, 153 Pa. 535.
[6] Denning v. Butcher, 91 Iowa, 425.
[7] Bolling v. State, 54 Ark. 588.
[8] McLeod v. State, 31 Tex. Crim. Rep. 331.
[9] State v. Klinger, 46 Mo. 224.
[10] State v. Stickley, 41 Iowa, 232.

him or how frequently he had seen him, or whether he had ever seen him before.[1] And it has been held that only such intimate acquaintances of the accused in a criminal prosecution as have seen him almost daily for several months preceding the alleged crime are competent as nonexpert witnesses to testify as to his sanity or insanity.[2]

Under statutory provisions making the opinions of intimate acquaintances respecting the mental capacity of a person competent, the evidence of all persons other than intimate acquaintances who are such by unreserved intercourse, and who are familiar with the mode and temperament of the person whose soundness is questioned, is excluded.[3] To constitute one an intimate acquaintance, close friendship and familiarity are required; there must be something more than a casual and ordinary acquaintance,[4] though where there is considerable evidence on the question of the intimate acquaintance of the witness he may be permitted to give his opinion though the showing of intimacy is not strong.[5] And a witness may testify as to the appearance of the person with reference to his being rational or irrational, though he is not shown to have been an intimate acquaintance.[6]

It does not require the same degree of intimacy, however, to qualify a witness to give his opinion as to whether a person is generally insane on all subjects, as in cases of monomania or partial derangement where the particular delusion might frequently escape attention; and one who had conversed with such person twice or more during the year previous to the act in question is competent to give his opinion as to whether he was entirely insane, though he would not be so to testify as to the mere existence of the insane delusion.[7] And witnesses in a prosecution for homicide who had not seen the accused for months are not rendered competent to give an opinion as to his sanity or insanity by the fact that on some occasions they had seen him give evidence of mental unsoundness where his mental aberrations were fitful or

[1] Taylor v. United States, 7 App. D. C. 27.
[2] Shults v. State, 37 Neb. 481.
[3] Carpenter v. Bailey, 94 Cal. 406; State v. Murray, 11 Or. 413.
[4] State v. Murray, 11 Or. 413.
[5] Carpenter v. Bailey, 79 Cal. 382.
[6] People v. Lavelle, 71 Cal. 351.
[7] Powell v. State, 25 Ala. 21.

rare and in the interval his mind was lucid.[1] Whether a witness had such acquaintance with a person whose sanity is questioned, and opportunity of observing him, as to qualify him to express an opinion as to his sanity or insanity, is a question for the trial court in the first instance,[2] resting largely in its discretion.[3] And while the question may be reviewed on appeal the discretion of the trial court in permitting witnesses to give their opinions on the question of sanity or insanity will not be disturbed unless such discretion has been abused,[4] where it appears that they were acquainted with the person and had more or less opportunity for acquiring knowledge on which to base an opinion.[5] Refusal to allow a witness in a will contest to give his opinion as to the mental capacity of the testator where the showing of intimacy is sufficient, however, is error and a ground for reversal on appeal.[6]

§ 12. *Knowledge which will warrant an opinion.*

To warrant an opinion as to sanity or insanity by a nonexpert witness some knowledge of the acts and conduct of the person whose sanity is questioned must appear.[7] The facts stated should furnish a rational ground for an opinion,[8] and show that the witness is qualified to give it.[9] And an opinion as to insanity must be supported by facts fairly indicative of mental incapacity.[10]

[1] Com. v. Buccieri, 153 Pa. 535.

[2] People v. Schmitt, 106 Cal. 48; People v. McCarthy, 115 Cal. 255.

[3] Brown v. Com. 14 Bush, 398; Carpenter v. Bailey, 94 Cal. 406; Hite v. Com. 14 Ky. L. Rep. 308.

[4] People v. Schmitt, 106 Cal. 48; Re Wax, 106 Cal. 343; People v. Lane, 101 Cal. 513; Wheelock v. Godfrey, 100 Cal. 578; Carpenter v. Bailey, 94 Cal. 406; People v. Fine, 77 Cal. 147; People, Clough, v. Levy, 71 Cal. 618; People v. McCarthy, 115 Cal. 255; State v. Hansen, 25 Or. 391.

[5] People v. Lane, 101 Cal. 513.

[6] Carpenter v. Bailey, 79 Cal. 382.

[7] Colee v. State, 75 Ind. 513.

[8] Jamison v. Jamison, 3 Houst. (Del.) 108; Potts v. House, 6 Ga. 324, 1 Am. Dec. 329; Pittard v. Foster, 12 Ill. App. 132; Waters v. Waters, 35 Md. 531; Elcessor v. Elcessor, 146 Pa. 359; Gibson v. Gibson, 9 Yerg. 329; Foster v. Dickerson, 64 Vt. 233.

[9] Sutherland v. Hankins, 56 Ind. 343; Stewart v. Redditt, 3 Md. 67; Woodcock v. Johnson, 36 Minn. 217; Yanke v. State, 51 Wis. 464.

[10] O'Connor v. Madison, 98 Mich. 183; Prentis v. Bates, 93 Mich. 234, 17 L. R. A. 494; Doran v. McConlogue, 150 Pa. 98; Dickinson v. Dickinson,

Taken as a whole they should be such as would apprise the court that the witnesses may clearly doubt the competency of the person upon reasonable grounds.[1] And they must all have been within the personal knowledge of the witnesses.[2] And a motion for a continuance in a criminal prosecution for the purpose of obtaining the evidence of a witness who was expected to give an opinion as to the insanity of the accused will not be granted where it is not probable that the jury would have believed his opinion to have been correct in the face of the facts upon which it was based.[3] And a motion for a new trial, based upon the alleged exclusion of the opinion of a witness, must allege that the witness had testified to facts showing him qualified to give the opinion, a mere reference to such evidence as inserted in a bill of exceptions not then signed and filed being insufficient.[4]

So, refusal to permit a nonexpert witness to give his opinion as to the sanity or insanity of a person is not error where the facts stated did not indicate that he was insane.[5] And an opinion is not warranted by testimony that the person whose sanity is questioned was erratic and changeable and sometimes got angry;[6] or that he was seen on one occasion when he seemed to be in a study, and did not reply when spoken to, and seemed not to recognize the witness or know that he was passing;[7] or that he did not eat with the family where he lived, or speak to the witness or his family, and was in some respects peculiar in his habits;[8] or that he lost his way near his home and sometimes addressed one of his daughters by the name of another and seemed low spirited and cried and sat all day without talking

61 Pa. 401; First Nat. Bank v. Wirebach, 106 Pa. 37, 12 W. N. C. 150; Stokes v. Miller, 10 W. N. C. 241.

[1] O'Connor v. Madison, 98 Mich. 183; People v. Borgetto, 99 Mich. 336; State v. Brooks, 4 Wash. 328. And see Boorman v. Northwestern Mut. Relief Asso. 90 Wis. 144.

[2] Pittard v. Foster, 12 Ill. App. 132; First Nat. Bank v. Wirebach, 106 Pa. 37; State v. Brooks, 4 Wash. 328.

[3] Fisher v. State, 30 Tex. App. 502.

[4] Sutherland v. Hankins, 56 Ind. 343.

[5] State v. Williamson, 106 Mo. 162.

[6] Prentis v. Bates, 88 Mich. 567.

[7] Shaver v. McCarthy, 110 Pa. 339.

[8] Stewart v. Redditt, 3 Md. 67.

unless someone spoke to him.[1] Nor is the expression of an opinion justified by evidence of frequent conversations with a testatrix about her children, her life, hardships which she had gone through, and other little family matters;[2] or by evidence that a testator was a man of active habits, but had had paralysis, after which there was a change in him, his physical capacity and activity and speech being affected, and expression of his countenance changed, and that it required an effort to speak, and that he did not look intelligent and seemed to be afflicted and distressed.[3] And evidence that a testatrix suffered during a designated year with a form of senile dementia indicated by feebleness, and passed abruptly in December of that year into complete senile dementia, is not sufficient to warrant a positive opinion as to whether the change had gone far enough in June of that year to destroy testamentary capacity.[4] So, testimony as to a change of physical appearance on the part of a grantor, and as to conversations about business, will not warrant the expression of an opinion as to capacity to dispose of property by one who had had no business transactions with him for years, and who had not seen him transact business.[5] But evidence that a grantor was in the habit of drinking to excess, and appeared to be afraid that his own slaves would kill him, sufficiently qualifies the witness to give an opinion,[6] though evidence of long acquaintance and friendly relations with a person accused of killing his wife, after a separation from her, and of conversations about the separation, gives no facts authorizing an opinion as to his insanity.[7]

It is not correct to say, however, that the opinion of a witness as to the mental condition of another is entitled to consideration only so far as the facts stated by him sustain the opinion, unless the proposition is understood to include among the facts referred to the acquaintance of the witness with the subject-matter and his opportunities for observation.[8] And the rule that witnesses

[1] Lynch v. Doran, 95 Mich. 396.
[2] Buys v. Buys, 99 Mich. 354.
[3] First Nat. Bank v. Wirebach, 12 W. N. C. 150.
[4] Lennig's Estate, 4 Pa. Dist. R. 94.
[5] Elcessor v. Elcessor, 146 Pa. 359.
[6] Dicken v. Johnson, 7 Ga. 484.
[7] State v. Brooks, 4 Wash. 328.
[8] Shanley's Appeal, 62 Conn. 325.

must state the facts upon which their opinions are based does not require them to describe that which is not susceptible of description or to relate facts enough to enable the jury to form an opinion from them alone.[1] And the fact that a witness is unable to give conversations with the person, but can only state the manner in which he conversed and that the facts known to him were limited in their character, does not render his opinion inadmissible.[2] The question whether the facts stated are sufficient to warrant an opinion is one of law for the court.[3] And it is the right of the opposite party to cross-examine the witnesses, before the court passes upon the question.[4] And the decision rests in the exercise of a wise legal discretion which will not be disturbed except in case of abuse.[5] The reasons of the witnesses for their opinions, however, are for the consideration of the jury, and not of the court.[6] And where any material facts are stated warranting an inference that the witness has sufficient knowledge to form an opinion, it is the duty of the court to permit them to go to the jury for whatever they may be worth.[7] The mere fact that a witness who had an opportunity to form a correct judgment is unable to state the circumstances upon which his opinion is based,[8] or that the circumstances stated by him did not justify his opinion,[9] does not warrant the court in excluding it or in instructing the jury to disregard it, the extent of the knowledge of the witnesses where there is sufficient evidence to go to the jury going to the effect to be given to the opinion rather than to its admissibility.[10]

[1] Beaubien v. Cicotte, 12 Mich. 459.

[2] Foster v. Dickerson, 64 Vt. 233.

[3] Colee v. State, 75 Ind. 513; Denning v. Butcher, 91 Iowa, 425; Whitenack v. Stryker, 2 N. J. Eq. 8; First Nat. Bank v. Wirebach, 12 W. N. C. 150; Boorman v. Northwestern Mut. Relief Asso. 90 Wis. 144.

[4] First Nat. Bank v. Wirebach, 12 W. N. C. 150.

[5] Denning v. Butcher, 91 Iowa, 425; Boorman v. Northwestern Mut. Relief Asso. 90 Wis. 144.

[6] Gray v. Obear, 59 Ga. 675; McClackey v. State, 5 Tex. App. 320. And see Colee v. State, 75 Ind. 513; Foster v. Dickerson, 64 Vt. 233.

[7] Goodwin v. State, 96 Ind. 550.

[8] Stubbs v. Houston, 33 Ala. 555.

[9] Stubbs v. Houston, 33 Ala. 555; Chickering v. Brooks, 61 Vt. 554.

[10] See *infra*, § 18, *Weight—nonexpert opinions.*

The opinion is not evidence, however, unless the jury finds the facts proved upon which it is based, but when such facts are found the opinion is a fact for the jury to consider in connection with other evidence.[1] A nonexpert witness may relate facts observed by him without expressing an opinion, leaving it to the jury to draw its conclusions therefrom on the question of mental capacity.[2]

§ 13. *Facts which may be shown as a basis for an opinion.*

The court in deciding a question of sanity or insanity relies upon the facts and circumstances proved by an expert witness rather than upon the opinions expressed by him,[3] and forms its opinion from the whole evidence consisting of facts and opinions.[4] And a witness in giving the facts upon which he bases his opinion should be permitted to state everything which could be reasonably made the foundation of an opinion as to the mental condition of the person in question,[5] whether occurring before or after the time his mind is claimed to have failed, together with what he said and did, and the change, if any, in his manner, including a full history of his life.[6] And where evidence of a conversation is given for the mere purpose of laying a foundation for the admission of the witness's opinion the entire conversation must be given, so far, at least, as it forms a part of the ground upon which the opinion is based.[7] So, the witness should be permitted to state in what manner the person's conversation was disconnected, as tending to show his qualification and as bearing upon the question of mental capacity.[8] And the acts and conduct of a person accused of crime, while under arrest therefor, may be given as a basis for the opinion of a witness, though the

[1] Foster v. Dickerson, 64 Vt. 233.

[2] Sharp v. Kansas City Cable R. Co. 114 Mo. 94.

[3] Hunt v. Hunt, 3 B. Mon. 575; Cilley v. Cilley, 34 Me. 162; Browne v. Molliston, 3 Whart. 129; McCullough's Will, 35 Pittsb. L. J. 169; Newton v. Carbery, 5 Cranch, C. C. 626; Clarke v. Cartwright, 1 Phillim. Eccl. Rep. 90.

[4] Newton v. Carbery, 5 Cranch, C. C. 626.

[5] Burkhart v. Gladish, 123 Ind. 338.

[6] Staser v. Hogan, 120 Ind. 227.

[7] Jamison v. People, 145 Ill. 357.

[8] Re Goldthorp, 94 Iowa, 336.

accused was not warned that his acts and expressions would be used against him.[1] So, a master in chancery before whom a testatrix had appeared as a witness may testify as to the circumstances under which she gave her testimony, and as to her appearance and deportment at the time, and state what questions were asked and the answers she gave, for the purpose of showing a basis for his opinion as to her mental condition.[2] And a petition to the probate court for an allowance to a widow from her husband's estate is admissible in a proceeding to contest her will, as a part of the *res gestæ* forming a basis for the opinion of her attorney as to her insanity, where he details the conversations and business transactions which he had with her at the time, the making of the petition being one of the transactions upon which he based his opinion.[3]

Evidence as to the contents of a will upon which a nonexpert witness bases his opinion, however, is not admissible unless the loss or destruction of the latter had been previously shown.[4] And a witness in a will contest cannot narrate communications from the testator to her and base her opinion upon them.[5] Nor does a statute permitting the opinion of an intimate acquaintance to be given as to mental capacity authorize the accused, as a matter of right, to give statements made by himself to witnesses in various conversations had with them.[6] And the superintendent of an insane asylum cannot give an opinion as to the mental condition of a former patient based on records of the asylum made before his connection with it where it, does not appear that he had any knowledge of the method of keeping the record employed at the time it was made.[7] So, a witness may be asked whether he saw enough of the person whose sanity is in question to warrant him in expressing an opinion as to his sanity or insanity.[8] And a witness who had stated that she considered the tes-

[1] Adams v. State, 34 Tex. Crim. Rep. 470.
[2] Foster v. Dickerson, 64 Vt. 233.
[3] Foster v. Dickerson, 64 Vt. 233.
[4] Adams v. State, 34 Tex. Crim. Rep. 470.
[5] Turner v. Cook, 36 Ind. 129.
[6] State v. Murray, 11 Or. 413.
[7] Prentis v. Bates, 93 Mich. 234, 17 L. R. A. 494.
[8] Watson v. Anderson, 11 Ala. 43; Pannell v. Com. 86 Pa. 260.

tatrix insane when excited, basing her opinion in part upon what the testatrix said about her husband, may be asked on cross-examination what the complaint of the testatrix against her husband was.[1] And where a witness testifying to the insanity of a party states that he had tried to buy land from him, he may be asked on cross-examination if he would have taken the conveyance had his proposition been accepted.[2] So, a witness who expresses an opinion as to the mental capacity of a testator may be asked on cross-examination as to any business transaction had with him at about the time in question, and as to the manner in which he conducted himself;[3] and if he knew of his breaking out in prayer meeting with obscene language, and wanting to go to the infant's school after he was seventy, and claiming to be in love with a young girl, and if it were true whether it would influence his impression.[4] Where a witness in a will contest states upon cross-examination that he predicated his opinion upon what he saw or knew of the testator, and in particular upon the evidence of another witness, however, the latter cannot be asked if he had stated that the testator was irrational and wandering in his conversations or otherwise.[5] And a witness who had testified that the person whose sanity is questioned had come to her house and talked at random and looked very much like a maniac, and that she was afraid of him, cannot be required to state the conversations had with him, when such conversations constituted no part of the transaction in question in the action.[6]

So, a witness cannot be asked whether the person whose sanity is questioned was considered to be partially deranged, such a question not calling for his own opinion.[7] Nor can an opinion be called for based upon what the witnesses had heard such person say.[8] But a question calling for an opinion based upon conversations with such person, and their character, and his actions

[1] Foster v. Dickerson, 64 Vt. 233.
[2] Rush v. Megee, 36 Ind. 69.
[3] Roe v. Taylor, 45 Ill. 485.
[4] Bell v. McMaster, 29 Hun, 272.
[5] Higgins v. Carlton, 28 Md. 115, 92 Am. Dec. 666.
[6] Taylor v. United States, 7 App. D. C. 27.
[7] Yanke v. State, 51 Wis. 464.
[8] Parsons v. Parsons, 66 Iowa, 754.

at the time, is not subject to the objection that it should have included all his observations during the entire period of his acquaintance, where no attempt is made to modify the evidence by cross-examination.[1] And a witness who is competent to give an opinion may, in forming such opinion, consider things which he saw and of which he had personal knowledge, though he did not describe them to the jury,[2] including any fact or circumstance within his knowledge or observation which to him appears to form evidence of the person's mental condition at the time in question whenever it occurred.[3] So, a statement of all the facts upon which an opinion is based does not seem to be necessary, the requirement having been variously stated as "of some of the facts,"[4] or such facts as the witnesses are able to give,[5] or the facts within their knowledge,[6] the rule definitely stated being that it is sufficient that they state facts which are visible and intelligent appearances and acts.[7]

§ 14. *Scope of opinions of nonexperts.*

The opinion of a nonexpert witness as to sanity or insanity must be limited to his conclusion with respect to the facts testified to by him,[8] and not embrace any matter of law.[9] And where the witnesses have given an opinion founded on facts known to them, they cannot be called on to say what their opinion would have been under a different state of affairs.[10] Nor can a nonexpert state on a trial for murder what kind of fits the accused was affected with,[11] or that he had discovered the accused to be a man of very weak mind.[12] So, a witness in a will contest in which an

[1] People v. Borgetto, 99 Mich. 336.
[2] Mull v. Carr, 5 Ind. App. 491.
[3] Re Norman, 72 Iowa, 84.
[4] Crowe v. Peters, 63 Mo. 429.
[5] Williams v. Lee, 47 Md. 321; Beaubien v. Cicotte, 12 Mich. 459.
[6] Price v. Richmond & D. R. Co. 38 S. C. 199.
[7] Beaubien v. Cicotte, 12 Mich. 459.
[8] Jamison v. People, 145 Ill. 357; Butler v. St. Louis L. Ins. Co. 45 Iowa, 93; Re Goldthorp, 94 Iowa, 336; DeWitt v. Barly, 17 N. Y. 340.
[9] DeWitt v. Barly, 17 N. Y. 340.
[10] Rambler v. Tryon, 7 Serg. & R. 90, 10 Am. Dec. 444.
[11] McLean v. State, 16 Ala. 672.
[12] Gardiner v. People, 6 Park. Crim. Rep. 155.

insane delusion is alleged cannot be asked whether the testator was competent to make a will where it is not denied that he was so except as to the subject of his delusion.[1] And while he is competent to give evidence as to his opinion as to whether a person accused of crime was entirely insane and could not distinguish right from wrong he would not be so to testify as to the mere existence of an insane delusion.[2] So, vague, indefinite expressions of a nonexpert witness in a criminal case that the accused looked and acted like an insane person are not admissible.[3] But a witness who had arrested the accused and taken him to jail may, after describing his appearance and manner during that time, and detailing what he said and did, give his opinion as to whether he was under the control of an insane delusion, with reference to the act charged.[4] So, insanity cannot be shown by evidence of a nonexpert witness, comparing the person with other insane persons whom the witness claims to know, and who are well known to be insane,[5] though he may compare the mind and memory of a testatrix, with reference to the amount of property she was worth and the dispositions she wished to make of it, with that of an average child of a designated number of years of age.[6] But he cannot be asked to contrast the testator's mental condition at a time not fixed or limited with his mental condition as it had been in prior years,[7] though he may be permitted to testify that he saw no difference between the testator's mental condition in sickness and his mental condition in health, where he had seen him both in sickness and in health.[8] So, a nonexpert witness cannot give an opinion as to the sanity or insanity of another witness,[9] or as to the physical capacity of a testator to hold conversations, testified to by another witness, where he was not present at that time.[10]

Neighbors of a testator who were well acquainted with him

[1] Taylor v. Trich, 165 Pa. 586.
[2] Powell v. State, 25 Ala. 21.
[3] Gehrke v. State, 13 Tex. 568.
[4] Bolling v. State, 54 Ark. 588.
[5] Gehrke v. State, 13 Tex. 568.
[6] Richmond's Appeal, 59 Conn. 226.
[7] Denning v. Butcher, 91 Iowa, 425.
[8] Severin v. Zack, 55 Iowa, 28.
[9] Territory v. Padilla (N. M.) 46 Pac. 346.
[10] Higgins v. Carlton, 28 Md. 115.

and competent to give opinions, however, may testify as to his appearance and why they thought he did not recognize them, and whether his mind was simply weakened or was impaired in some of its faculties, and whether he was worse or better and could or could not hold extended conversation.[1] And a witness in an action founded upon a contract or deed may be asked as to the capacity of the party to transact business.[2] And so may a witness in a will contest.[3] And a nonexpert may testify as to the capacity of the testator to comprehend his property and make an intelligent disposition thereof by will.[4] Such evidence as to the competency of a testator to make a will is not objectionable because the attention of the witness was not directed to the will in question where it was not a complicated one.[5] And testimony that a testator was not fit to make a will is not incompetent, there being no distinction between competency to understand a will, and fitness to make one.[6] And refusal to admit an opinion as to whether the testator had mind enough to understand his will, or could have been taught to understand it, is not prejudicial error where he was permitted to testify that he had not mind enough to make a will and understand its nature and contents.[7] So, evidence upon an issue as to the soundness or unsoundness of mind of one for whom a trust had been created, to the effect that the witness had known him from birth and that he was not of sound mind and capable of managing his property, is competent.[8] And a witness who had stated that the testator had not such knowledge of his property and relations as to make a proper and intelligent disposition may be asked on cross-examination as to his opinion of the propriety and intelligence of the several dispositions of the will and this should be done, not by handing him the will to consider, but by reading the provisions to him and questioning him with relation to them.[9]

[1] Meeker v. Meeker, 74 Iowa, 352.

[2] Stewart v. Spedden, 5 Md. 433; Wilkinson v. Pearson, 23 Pa. 117.

[3] Keithley v. Stafford, 126 Ill. 507.

[4] Porter v. Throop, 47 Mich. 313; Re Pinney, 27 Minn. 280; Bost v. Bost, 87 N. C. 477.

[5] Rice v. Rice, 53 Mich. 432.

[6] Daniel v. Daniel, 39 Pa. 191.

[7] Overall v. Bland, 11 Ky. L. Rep. 371.

[8] Obear v. Gray, 73 Ga. 455.

[9] Waters v. Waters, 35 Md. 531.

The impressions made upon the mind of a witness by the conduct, manner, bearing, conversations, appearance, and acts of a testator in various business transactions for a series of years, however, is not mere opinion which is admissible in evidence, it is knowledge, and strictly analogous to cases of personal identity and handwriting.[1] And evidence of feelings manifested by a testator toward his brother is of fact rather than an opinion, and is admissible in a contest of the will upon the question of the testator's insanity.[2] Nor is the right to testify as to whether a person appeared to be rational or irrational confined to expert witnesses and intimate acquaintances, as this does not constitute giving an opinion, but is the statement of an open truth indicated to all alike.[3] So, evidence that a testator acted strangely or in a childish manner may be given by a person who saw him, stating facts upon which the opinion was based.[4] And a nonexpert witness who knew the facts may testify as to the apparent physical condition of a person, and as to whether he acted sane or insane.[5]

§ 15. *Opinions covering the question at issue.*

The question as to whether witnesses on the question of insanity may give opinions covering the point at issue has given rise to an apparent conflict of authority. Thus, questions calling for an opinion as to the capacity of a person accused of crime to distinguish between right and wrong, or between right and wrong with reference to the particular act, have been frequently sustained;[6] and similar questions have been overruled for other causes where no objection was made on that ground.[7] And questions calling for opinions as to the capacity of a party to

[1] Townshend v. Townshend, 7 Gill, 10. And see State v. Ryan, cited in 1 Jarman, Wills, 122, note.

[2] Pelamourges v. Clark, 9 Iowa, 1.

[3] Holland v. Zollner, 102 Cal. 633; People v. McCarthy, 115 Cal. 255.

[4] Parsons v. Parsons, 66 Iowa, 754.

[5] Cannady v. Lynch, 27 Minn. 435.

[6] Powell v. State, 25 Ala. 21; Smith v. State, 55 Ark. 259; State v. Porter, 34 Iowa, 131; Pflueger v. State, 46 Neb. 493; Clark v. State, 12 Ohio, 483, 10 Am. Dec. 481; United States v. Guiteau, 1 Mackey, 498, 47 Am. Rep. 247; M'Naghten's Case, 10 Clark & F. 200.

[7] See Billings v. State, 54 Ark. 588; Com. v. Rich, 14 Gray, 335; Mendiloa v. State, 18 Tex. App. 462.

make a contract or deed have also been sustained,[1] and overruled in the same manner.[2] And similar rulings have been made on the question as to whether a testator possessed testamentary capacity or capacity to make the will in question on the one hand,[3] and overruled upon the other on other grounds.[4] So, questions calling for opinions as to the capacity of a party to manage himself and his estate have been sustained in proceedings in the nature of a writ *de lunatico inquirendo* and under the same circumstances;[5] and a question as to what effect, if any, the disease of melancholia would have upon the power of the insured to control her actions and resist any impulse with which she might be seized, is admissible in an action upon an insurance policy in which it is claimed that the insured killed herself while insane.[6] And it has been held competent, in a contest over the probate of a will which discriminated against some of the chil-

[1] Beller v. Jones, 22 Ark. 92; Stewart v. Spedden, 5 Md. 423; Townshend v. Townshend, 7 Gill, 10; Wilkinson v. Pearson, 23 Pa. 117; Doe, McDougald, v. McLean, Winst. L. pt. 1, p. 120; Cram v. Cram, 33 Vt. 15; Kilgore v. Cross, 1 Fed. Rep. 578.

[2] Smith v. Smith, 157 Mass. 389; Hyer v. Little, 20 N. J. Eq. 443.

[3] Roberts v. Trawick, 13 Ala. 68; Ethridge v. Bennett, 9 Houst. (Del.) 295; Coryell v. Stone, 62 Ind. 307; Overall v. Bland, 11 Ky. L. Rep. 371; Chandler v. Barrett, 21 La. Ann. 58, 99 Am. Dec. 701; Waters v. Waters, 35 Md. 531; Dorsey v. Warfield, 7 Md. 65; Hastings v. Rider, 99 Mass. 624; Rice v. Rice, 53 Mich. 432; Porter v. Throop, 47 Mich. 313; Kempsey v. McGinniss, 21 Mich. 123; McGinniss v. Kempsey, 27 Mich. 363; McHugh v. Fitzgerald, 103 Mich. 21; Appleby v. Brock, 76 Mo. 314; Garrison v. Garrison, 15 N. J. Eq. 266; Horah v. Knox, 87 N. C. 490; Wogan v. Small, 11 Serg. & R. 131; Bitner v. Bitner, 65 Pa. 347; Daniel v. Daniel, 39 Pa. 191; Commonwealth Title Ins. & T. Co. v. Gray, 150 Pa. 255; Shaver v. McCarthy, 110 Pa. 339; Doe, McDougald, v. McLean, Winst. L. pt. 1, p. 120; Brown v. Mitchell, 87 Tex. 140; Cockrill v. Cox, 65 Tex. 676; Garrison v. Blanton, 48 Tex. 299.

[4] Re Taylor, 92 Cal. 564; Rush v. Megee, 36 Ind. 69; Prentis v. Bates, 93 Mich. 234, 17 L. R. A. 494; Rice v. Rice, 50 Mich. 448, 53 Mich. 432; Kempsey v. McGinniss, 21 Mich. 123; Appleby v. Brock, 76 Mo. 314; Re Arnold, 14 Hun, 525; Taylor v. Trich, 165 Pa. 586; Elcessor v. Elcessor, 146 Pa. 359; Shaver v. McCarthy, 110 Pa. 339; Lennig's Estate, 4 Pa. Dist. R. 94; Stokes v. Miller, 10 W. N. C. 241; Vance v. Upson, 66 Tex. 476; Kerr v. Lunsford, 31 W. Va. 680, 2 L. R. A. 668.

[5] Re Mason, 60 Hun, 46; Obear v. Gray, 73 Ga. 455.

[6] Koenig v. Globe Mut. L. Ins. Co. 10 Hun. 558.

dren of the testator, to ask a medical expert whether in his opinion, on an assumed state of facts, the testator was capable of comprehending his moral obligations to his children as bearing upon his competency to make a will.[1] And in a late case in the United States Supreme Court an expert in a prosecution for homicide was permitted to be asked on cross-examination if from his experience and conversations with the accused he thought he killed the man because he threatened his life.[2]

Upon the other hand, the contrary rule has been generally, if not universally, held in cases in which the objection that the question covered the point at issue has been made, and it has been held that experts cannot be asked the broad question whether or not they considered the person whose sanity is in question out of his mind, or whether his mind was so affected as to be unfit to transact business,[3] or give their opinions upon the whole case, as this would necessarily include a determination of what are the facts;[4] though they may give opinions on similar cases hypothetically stated.[5] Hypothetical questions must be so shaped, however, as to give the witness no occasion to draw his conclusion from the evidence as to the weight or credibility thereof,[6] and are not to be based upon facts in relation to which there is conflicting and contradictory testimony, and which virtually requires them to assume the province of the jury in weighing the testimony.[7] Thus with relation to criminal prosecutions an expert witness may give his opinion as to the state of mind of the accused, but not as to his responsibility, that being a question for the

[1] Rivard v. Rivard (Mich.) 2 Det. L. N. 1003.

[2] Davis v. United States, 165 U. S. 373, 41 L. ed. 750.

[3] Deshon v. Merchants' Bank, 8 Bosw. 461; Chickering v. Brooks, 61 Vt. 554.

[4] Negroes Jerry, v. Townshend, 9 Md. 145; Yardley v. Cuthbertson, 108 Pa. 395, 56 Am. Rep. 218; Re McCarthy, 55 Hun, 7.

[5] Negroes Jerry, v. Townshend, 9 Md. 145; Gunter v. State, 83 Ala. 96; Coyle v. Com. 104 Pa. 117.

[6] Com. v. Rogers, 7 Met. 500, 41 Am. Dec. 458; McMechen v. McMechen, 17 W. Va. 683, 41 Am. Rep. 682.

[7] Gunter v. State, 83 Ala. 96; Smith v. Hickenbottom, 57 Iowa, 733; Coyle v. Com. 104 Pa. 117; Fairchild v. Bascomb, 35 Vt. 398; Bennett v. State, 57 Wis. 67, 46 Am. Rep. 26. And see Fayette v. Chesterville, 77 Me. 28, 52 Am. Rep. 741.

jury.[1] And he cannot be asked his opinion as to whether the accused was capable of judging between right and wrong.[2] Nor should he be asked his opinion as to the sanity or insanity of the accused at the time of the trial, based upon the testimony adduced at the trial,[3] or formed from his observation of his conduct on the trial,[4] as this would practically put him in the place of the jury. Nor should he be permitted to express an opinion that the accused acted under an insane delusion or was impelled by an irresistible impulse,[5] or that he should have the benefit of every reasonable doubt that may arise as to his sanity, where he had been undeniably subject to fits of epilepsy.[6]

So, a witness will not be permitted to give an opinion as to the capacity of another to make a contract or deed or other instrument, where it assumes the shape and has the effect of being an opinion upon the legal capacity of the party in question.[7] He may be asked as to his sanity or insanity upon the facts where they are certain, or upon a case hypothetically stated, but he cannot determine what the facts are from the evidence, and give his opinion upon them.[8] Nor is a question proper which would make the question of the competency of the party depend upon the degree of intelligence which the witnesses might think necessary to sustain the instrument.[9] So, while nonexperts may express an opinion as to the soundness of mind of a party upon an issue as to whether he was incapable of managing his estate, they cannot give an opinion as to his capacity to conduct the ordinary affairs of life,[10] though a witness may express the extent of the incapacity of a party by saying that he has not sufficient mental capacity to transact business when from the connection in which the words

[1] Reg. v. Richards, 1 Fost. & F. 87; Reg. v. Burton, 3 Fost. & F. 772; People v. Thurston, 2 Park. Crim. Rep. 49.

[2] Shults v. State, 37 Neb. 487; Reg. v. Layton, 4 Cox, C. C. 149.

[3] Reed v. State, 62 Miss. 405.

[4] State v. Felter, 25 Iowa, 67.

[5] Patterson v. State, 86 Ga. 70.

[6] State v. Klinger, 46 Mo. 224.

[7] Conner v. Stanley, 67 Cal. 315; Brown v. Mitchell, 88 Tex. 350, 36 L. R. A. 64; Schneider v. Manning, 121 Ill. 376.

[8] Dexter v. Hall, 82 U. S. 15 Wall. 9, 21 L. ed. 73.

[9] Aiman v. Stout, 42 Pa. 114.

[10] Hamrick v. State, 134 Ind. 324.

are used it can be seen they best convey his own ideas of the matter.[1]

Nor is capacity to make a will a simple question of fact; it is a conclusion arising from certain facts. And while a competent witness may give an opinion as to the mental condition of the testator, an opinion as to his capacity to make a will is inadmissible;[2] that is a question for the jury to determine from the facts.[3] And a question calling for such an opinion is objectionable as requiring the witness to determine for himself what in law constitutes testamentary capacity.[4] No witness in a will contest, whether he be a subscribing witness, an expert, or a nonexpert, can state his opinion of the capacity of a testator to make a will, when it assumes the shape and has the effect of being an opinion as to his legal capacity.[5] They should be asked for opinions as to the real state of the testator's mind, how much intelligence he possesses, and how far he was capable of understanding the nature and situation of his property and his relation to others, and the reasons for giving or withholding his bounty, as distinguished from questions as to whether he had a disposing mind and memory or whether he was capable of making a will.[6] So, hypothetical questions must be so shaped as to give the witness no occasion to draw his conclusion from the evidence, or to decide as to the weight of evidence or the credibility of witnesses.[7] And he cannot be asked whether the testator was subject to a delusion.[8] And the question as to whether a change in a testator's lifelong

[1] Chickering v. Brooks, 61 Vt. 554.

[2] Brown v. Mitchell, 88 Tex. 350, 36 L. R. A. 64; Walker v. Walker, 34 Ala. 469; Re Taylor, 92 Cal. 564; Keithley v. Stafford, 126 Ill. 507; May v. Bradlee, 127 Mass. 414; Hall v. Perry, 87 Me. 569; Kempsey v. McGinniss, 21 Mich. 123; White v. Bailey, 10 Mich. 155; Farrell v. Brennan, 32 Mo. 328, 82 Am. Dec. 137; Wisener v. Maupin, 2 Baxt. 342.

[3] Schneider v. Manning, 121 Ill. 376; Runyan v. Price, 15 Ohio St. 1, 86 Am. Dec. 459.

[4] Kempsey v. McGinniss, 21 Mich. 123; Horah v. Knox, 87 N. C. 490; Runyan v. Price, 15 Ohio St. 1, 86 Am. Dec. 459.

[5] Brown v. Mitchell, 88 Tex. 350, 36 L. R. A. 64.

[6] Kempsey v. McGinniss, 21 Mich. 123; Keithley v. Stafford, 126 Ill. 507; Fairchild v. Bascomb, 35 Vt. 398.

[7] Kerr v. Lunsford, 31 W.Va. 680, 2 L. R. A. 668.

[8] Rush v. Megee, 36 Ind. 69.

purpose, made on his deathbed without apparent reason, indicates a change in his mental powers, is not one for an expert.[1] The admission in evidence of opinions on the general question of testamentary capacity, however, though erroneous, does not require a reversal where the facts were competent evidence and sufficient to uphold the determination,[2] or where the objection was general and did not call attention to the form of the question.[3] And an opinion of a witness will be regarded as a statement as to the condition of the testatrix if practicable rather than as an expression as to his competency to make a will, and therefore inadmissible.[4]

§ 16. *Time to which opinion evidence relates.*

Opinions of witnesses on the question of sanity or insanity of a person must be confined to periods upon which the witness testifies that he had observed his conduct and appearance.[5] And they cannot be required to give opinions as to capacity previous to that time.[6] Thus, nonexpert witnesses cannot give their opinions in a will contest as to the mental condition of a testator on the day of the execution of the will when they did not see him on that day.[7] Nor can they be asked whether or not a testator was of sound mind, without fixing the time to which the question relates.[8] And the opinion of a witness as to the sanity of a person accused of crime, who had stated that he knew him some years since, will be taken as referring to the period of his acquaintance up to the time he last saw him, and not to the time of the trial.[9] And the opinions of medical men who give certificates adjudging a party to a contract to be insane at or about the time of making the contract is evidence only upon the question of his insanity at that time.[10]

[1] Re Nelson, 39 Minn. 204.

[2] Clapp v. Fullerton, 34 N. Y. 190, 90 Am. Dec. 681; Vance v. Upson, 66 Tex. 476.

[3] Foster v. Dickerson, 64 Vt. 233.

[4] McHugh v. Fitzgerald, 103 Mich. 21.

[5] Shults v. State, 37 Neb. 481; Runyan v. Price, 15 Ohio St. 1, 86 Am. Dec. 459; Woodcock v. Johnson, 36 Minn. 217.

[6] Runyan v. Price, 15 Ohio St. 1, 86 Am. Dec. 459.

[7] Blake v. Rourke, 74 Iowa, 519.

[8] Denning v. Butcher, 91 Iowa, 425.

[9] Powell v. State, 25 Ala. 21.

[10] Lovatt v. Tribe, 2 Fost. & F. 9.

So, a witness must state his opinion as to the mental capacity of the person in question at the time of giving his testimony, and not the opinion which he entertained several years before at about the time of the act in question, and which subsequent consideration and reflection might have satisfied him was erroneous.[1]

The fact that a nonexpert witness did not form his opinion at the time he saw and observed the facts testified to by him, however, does not render his opinion inadmissible.[2] And the testimony of a medical expert as to the sanity of a person accused of crime, founded upon his appearance at the time of the trial, is admissible.[3] And a medical witness may testify from an examination made in July as to whether the accused was insane during the preceding March.[4] And physicians who had previously attended a testator on his deathbed may be permitted to testify as to their opinion of his mental capacity immediately before and after the execution of the will during his sickness.[5] So, witnesses in a prosecution for murder may give their opinions as to the state of the defendant's mind prior to and at the time of the commission of the act.[6] And where the physician was acquainted with the defendant and with his mental condition at a prior period of his life when he was insane, he may state his opinion as to his sanity or insanity at that time as bearing upon his mental condition at the time of the commission of the crime.[7] But a physician who attended a testator about a week after he had a stroke of paralysis cannot be asked, on application to set aside the probate of his will, whether he considered him possessed of testamentary capacity between the time of his shock and the time of his death.[8] And after a lapse of more than fifty years with opportunity at all times to contest a will in the ordinary way the door will not be open to mere speculative opinion as to the mental condition of the testator.[9]

[1] Runyan v. Price, 15 Ohio St. 1, 86 Am. Dec. 459.
[2] Hathaway v. National L. Ins. Co. 48 Vt. 336.
[3] McAllister v. State, 17 Ala. 434, 52 Am. Dec. 180.
[4] Freeman v. People, 4 Denio, 9, 47 Am. Dec. 216.
[5] Hastings v. Rider, 99 Mass. 624.
[6] Baldwin v. State, 12 Mo. 227.
[7] State v. Felter, 25 Iowa, 67.
[8] Re Arnold, 14 Hun, 525.
[9] Chase v. Winans, 59 Md. 475.

§ 17. *Weight—Expert opinion.*

While expert opinions as to insanity are to be received with caution and subjected to patient and intelligent investigation, they are entitled to great weight,[1] particularly where the expert witnesses have special opportunities for observation;[2] and the court on habeas corpus to discharge a person from an asylum will not reject as erroneous the uncontradicted opinions of unprejudiced experts of high standing that he is insane, simply because it cannot detect the existence of the mental disorder.[4] So the evidence of a medical expert in a criminal prosecution will not justify a verdict of insanity where he gives his opinion that the accused was in a measure able to distinguish right from wrong.[5] The weight of the opinion of an expert depends upon the experience, study, scientific eminence, and professional character and standing of the witness,[6] and the jury should consider whether the testimony of an expert is partisan in its character or biased by any leaning for or against any of the parties;[7] and the opinion of a physician who had not studied the progress of the disease in question, and who had limited opportunities for observing the personal habits and conduct of the person whose sanity is in question, is of little, if any, value.[8] Nor will a person be interdicted on the ground of idiocy and imbecility on the evidence of two medical witnesses neither of whom had ever conversed with him until the day before the filing of their report, and who had had no opportunity to test his mental condition.[9]

The opinions of experts must be brought to the test of facts

[1] Wilcox v. State, 94 Tenn. 106; People v. Lake, 12 N. Y. 358.

[2] Choice v. State, 31 Ga. 424; Cheatham v. Hatcher, 30 Gratt. 56, 32 Am. Rep. 650; Montague v. Allan, 78 Va. 592, 49 Am. Rep. 384; Nicholas v. Kershner, 20 W. Va. 251; Jarrett v. Jarrett, 11 W. Va. 584.

[3] Cheatham v. Hatcher, 30 Gratt. 56, 32 Am. Rep. 650; Montague v. Allan, 78 Va. 592, 49 Am. Rep. 384; Nicholas v. Kershner, 20 W. Va. 251; Jarrett v. Jarrett, 11 W. Va. 584.

[4] Sherman's Petition, 17 R. I. 356.

[5] State v. Kalb, 2 Ohio L. N. 364.

[6] Jamison v. Jamison, 3 Houst. (Del.) 108; People v. Kemmler, 119 N. Y. 580; People v. Lake, 2 Park. Crim. Rep. 215.

[7] Rush v. Megee, 36 Ind. 69.

[8] State v. Kalb, 2 Ohio Leg. News, 364.

[9] Watson's Interdiction, 31 La. Ann. 757.

that the court may judge what weight they are entitled to,[1] the question whether the hypothesis corresponds with the facts being for the jury.[2] And they can be of but little value where the facts upon which they are predicated are not established,[3] or where the hypothetical question put to the witnesses is wholly or materially incorrect or not justified by the evidence,[4] or where it is founded on reasons which are absurd or not well founded;[5] and the evidence of a medical expert in a will contest on the question of testamentary capacity, whose opinion is based upon supposed facts not borne out by the testimony, and evidence which in no way tends to show that the testator was not sane, is not sufficient to shift the burden of proof of mental capacity to the proponents.[6] An instruction that the jury ought to consider and weigh all the evidence, including the evidence of experts, tending to show the condition of the testator's mind, however, is not subject to the objection that it directs the jury that they may give more weight to the opinions of experts than others, though some of the assumed facts stated in the hypothetical question might have been found to be untrue.[7] And refusal to instruct that no weight is to be given to the evidence of experts when some of the facts upon which hypothetical questions are based are not found to be true is not prejudicial error, where the court had instructed that the weight of such opinion was for the jury to consider in view of all the other testimony in the case.[8]

Scientific evidence is not necessarily required, however, to satisfy a jury of the insanity of a person; it is sufficient if the evidence of the facts was such as to indicate an insane state of mind.[9] For

[1] Stackhouse v. Horton, 15 N. J. Eq. 202.

[2] People v. Lake, 12 N. Y. 358; People v. Thurston, 2 Park. Crim. Rep. 49; M'Naghten's Case, 10 Clark & F. 200; Rex v. Searle, 1 Moody & R. 75.

[3] First Nat. Bank v. Wirebach, 106 Pa. 37; Hovey v. Chase, 52 Me. 304, 83 Am. Dec. 514. And see Stackhouse v. Horton, 15 N. J. Eq. 202; Prinsep v. Dyce Sombre, 10 Moore, P. C. C. 232.

[4] Guetig v. State, 66 Ind. 94, 32 Am. Rep. 99; Re Lyddy, 24 N. Y. S. R. 607.

[5] Crockett v. Davis, 81 Md. 134.

[6] Re Lyddy, 24 N. Y. S. R. 607.

[7] Bever v. Spangler, 93 Iowa, 576.

[8] Bever v. Spangler, 93 Iowa, 576.

[9] Reg. v. Dart, 14 Cox, C. C. 143; People v. Finley, 38 Mich. 482; Beaubien v. Cicotte, 12 Mich. 459.

legal purposes incapacity, either criminal or civil, must be judged from manifestations of conduct and language, and the circumstances and symptoms with reference to which a physician alone can perceive mental disorder may aid in understanding the manifestations subsequently appearing, but can have little further value;[1] and expert testimony which is made up largely of mere theory and speculation, and which suggests mere possibilities, ought never to be allowed to overcome clear and well-established facts.[2] Thus, the opinions of the neighbors of a person who are men of good common sense are of more value than those of medical experts, upon the question whether the mental disease with which the testator was afflicted had reached such a stage as to render him incapable of making a will or contract, or irresponsible for his acts.[3] And letters evidencing a sound, discriminating mind are more reliable than speculations and opinions of witnesses as to mental incapacity.[4] So, the testimony of a physician who formed his opinion from the condition of the testatrix, and not from conversations with her, against mental capacity, who at first had many opportunities of forming such opinion but whose interviews later were more seldom, will not warrant the rejection of testimony in favor of mental capacity of all those who were about her deathbed, and whose intercourse was frequent, and who had conversed with her on many questions and saw business transacted by her, and were the witnesses to a codicil to her will.[5] Nor will a will be refused probate on the opinion of a medical expert against testamentary capacity, where, in order to do so, it would be necessary to find as a fact that each of the subscribing witnesses had committed wilful perjury.[6]

So, the opinion of a physician who attended a testator during his last illness is entitled to more weight on the question of testamentary capacity than the opinions of physicians who had not

[1] Fraser v. Jennison, 42 Mich. 206.

[2] State v. Hockett, 70 Iowa, 442; Burley v. McGough, 115 Ill. 11; Rankin v. Rankin, 61 Mo. 295; Re Andrews, 33 N. J. Eq. 514; Palmer's Estate, 5 W. N. C. 542.

[3] Rutherford v. Morris, 77 Ill. 397.

[4] Harper v. Harper, 1 Thomp. & C. 351.

[5] Crolius v. Stark, 64 Barb. 112.

[6] Re Lyddy, 17 N. Y. S. R. 2.

this advantage;[1] though evidence of experts who knew the testator and treated him cannot be said to be entitled to greater weight, as matter of law, than experts who founded their opinions merely upon hypothetical questions.[2] And evidence by expert witnesses who have devoted their time and attention to cases of mental derangement is of much greater value than that of other persons who can only speak from observation of outward scenes and appearances;[3] and next to them great respect should be given to the evidence of witnesses whose intercourse and public relations with men enable them from experience and observation to form an opinion of men's motives from their speech and actions.[4] And it is the duty of the jury to weigh the whole evidence and decide according to their convictions though medical witnesses are of a different opinion;[5] and an instruction to that effect is not subject to the objection that it informs the jury that the testimony of experts is not entitled to greater weight than that of nonexperts.[6] So, the opinion of unprejudiced medical witnesses that a person is insane is sufficient to overcome the presumption of sanity, though it is supported by the testimony of nonexpert witnesses none of whom had had extensive opportunity to judge of the person's mental condition.[7] And a statement by a judge in a will contest that he relied with more confidence upon the opinion of an intelligent attending physician than he did upon the subsequent opinions of four physicians who had not seen the testator during his illness, but based their opinion as to his soundness of mind upon the nature of the disease, is not reversible

[1] Harrison v. Rowan, 3 Wash. C. C. 580. And see Whelpley v. Loder, 1 Dem. 368.

[2] Bever v. Spangler, 93 Iowa, 576.

[3] Watson v. Anderson, 13 Ala. 202; State v. Reidell, 9 Houst. (Del.) 470; Hendrix v. Money, 1 Bush, 306; Stackhouse v. Horton, 15 N. J. Eq. 202; Com., Helmbold, v. Kirkbride, 11 Phila. 427. And see Kemble v. Church, 3 Hagg. Eccl. Rep. 273.

[4] Com., Helmbold, v. Kirkbride, 11 Phila. 427.

[5] Watson v. Anderson, 13 Ala. 202; Stackhouse v. Horton, 15 N. J. Eq. 202. And see McAllister v. State, 17 Ala. 434, 42 Am. Dec. 180; People v. Finley, 38 Mich. 482; Doughty v. Doughty, 7 N. J. Eq. 643.

[6] Goodwin v. State, 96 Ind. 550.

[7] Com., Helmbold, v. Kirkbride, 11 Phila. 427.

error.[1] Nor is an instruction, that the testimony of medical men of large experience on the question of insanity is entitled to more weight than that of nonprofessional men, but that the question of weight is for the jury, erroneous where the medical men were not mere experts whose opinions were founded on the facts testified to by other witnesses, but persons who had made a personal examination for the very purpose of ascertaining as to the person's mental capacity.[2]

Jurors are not bound, however, to give more weight to the testimony of medical experts as to insanity than that of nonexperts who state facts within their own knowledge; it is not for the court to pronounce, as matter of law, which of the two classes shall receive the greater weight,[3] and an instruction to give greater weight to the opinions of physicians is improper.[4] Nor are the opinions of expert witnesses of much, if any, weight where there is considerable conflict between them;[5] but it is not error for the court in such case to refuse to charge that the opinion of those who have not had practical experience should be disregarded, where nothing is said to the jury calculated to mislead them.[6] Nor should the jury be told that no medical expert had testified, and that the finding must be based upon the testimony of neighbors and intimate friends, where physicians did testify, though their opinions were conflicting.[7]

So, the opinions of medical experts are not conclusive, but must be weighed as any other evidence;[8] but they are to be considered by the jury in connection with all the other evidence, and to be given just weight.[9] The opinion of an expert witness

[1] Kirkwood v. Gordon, 7 Rich. L. 474, 62 Am. Dec. 418.

[2] Blake v. Rourke, 74 Iowa, 519; Meeker v. Meeker, 74 Iowa, 352.

[3] Sanders v. State, 94 Ind. 147.

[4] Carpenter v. Calvert, 83 Ill. 62.

[5] Jamison v. Jamison, 3 Houst. (Del.) 109.

[6] People v. Montgomery, 13 Abb. Pr. N. S. 207.

[7] Vanvalkenburg v. Vanvalkenburg, 90 Ind. 434.

[8] McAllister v. State, 17 Ala. 434, 52 Am. Dec. 180; Williams v. State, 50 Ark. 511; Choice v. State, 31 Ga. 424; Guetig v. State, 66 Ind. 94, 32 Am. Rep. 99; Chandler v. Barrett, 21 La. Ann. 58, 99 Am. Dec. 701; Francke v. His Wife, 29 La. Ann. 302; Re Kiedaisch, 2 Connoly, 438; Tomkins v. Tomkins, Bail. L. 92; Lovatt v. Tribe, 3 Fost. & F. 9.

[9] Guetig v. State, 66 Ind. 94, 32 Am. Rep. 99; Francke v. His Wife, 29 La. Ann. 302.

as to sanity or insanity is a fact, the question of proper weight to be given it falling within the province of the jury;[1] and so is the question as to whether or not the facts upon which the opinion of an expert is based are established.[2] And where the opinion of an expert has been admitted, and is based upon facts hypothetically stated which vary somewhat from the facts proved on the trial, a charge that the opinion is entitled to but little weight is properly refused.[3] The jury should be left at liberty to apply the same general rules to the testimony of experts that are applicable to the testimony of other witnesses in estimating its value,[4] and a verdict against the validity of a will will not be disturbed, though it was rational in its provisions and was written and attested by a physician without interest who testified in favor of testamentary capacity, where the other attesting witness testified that the testator was incompetent by reason of his physical and mental condition, and other witnesses, including another attending physician, testified against testamentary capacity.[5] And testamentary capacity may be held to be sufficient though a large number of witnesses testify that the testator could not comprehend ordinary business transactions, and though he disinherited most of his relatives, where a larger number, including his pastor and family physician and the subscribing witnesses, give evidence tending to prove competency.[6]

So, an instruction that the opinions of medical witnesses should be received with caution, and are entitled to but little weight unless sustained by reasons and facts that admit of no misconstruction, is objectionable as a comment upon the sufficiency and weight of evidence;[7] and so is one assigning more weight to the testimony of nurses and attendants than to the opinions of subscribing witnesses;[8] or one that expert witnesses speaking merely

[1] Gunter v. State, 83 Ala. 96; Kempsey v. McGinniss, 21 Mich. 123; Maynard v. Vinton, 59 Mich. 139, 60 Am. Rep. 276; Blake v. Rourke, 74 Iowa, 519; Meeker v. Meeker, 74 Iowa, 352.

[2] First Nat. Bank v. Wirebach, 106 Pa. 37.

[3] Gunter v. State, 83 Ala. 96.

[4] Cuneo v. Bessoni, 63 Ind. 524.

[5] Sydner v. Cunningham, 13 Ky. L. Rep. 24.

[6] Forman v. Smith, 7 Lans. 443.

[7] State v. Hundley, 46 Mo. 414.

[8] Brown v. Riggin, 94 Ill. 560.

as to matters of opinion based upon hypothetical questions are entitled to more credit than witnesses who had knowledge of facts gathered from personal observation and who based their opinions on actual facts.[1] And an instruction that the testimony of experts is usually of very little value, and that their opinions are not so highly regarded as formerly, is erroneous,[2] and the jury should not be told that medical witnesses are to be regarded as the lowest order of witnesses where the question was as to whether the person in question was afflicted with a certain form of epilepsy, and as to the particular characteristics of that particular form of it.[3] Nor is it proper for the court, in the presence of the jury, to question whether they will realize much, if any, valuable aid from experts in coming to a correct conclusion on the question of mental capacity, where evidence has been given of their observation, experience, and skill sufficient to enable them to form intelligent opinions.[4] A remark by the judge in charging the jury in a criminal prosecution in which experts have been examined, however, that in his experience and observation doctors can be obtained to swear on both sides of any question, is not objectionable as adding the testimony derived from the experience of the judge.[5] And an instruction that the evidence of an expert is of little value is not reversible error as against the plaintiff in a will contest where he was called by and testified strongly in favor of the proponent.[6]

§ 18. *Weight—nonexpert opinions.*

The weight to be given the opinions of nonexpert witnesses as to the sanity of a person depends upon a consideration of all the circumstances under which they were formed;[7] and upon the knowledge of the witnesses and their opportunities for observation;[8]

[1] Goodwin v. State, 96 Ind. 550.
[2] Eggers v. Eggers, 57 Ind. 461.
[3] State v. Townsend, 66 Iowa, 741.
[4] Pannell v. Com. 86 Pa. 260.
[5] People v. Webster, 59 Hun, 398.
[6] Bundy v. McKnight, 48 Ind. 502.
[7] Moore v. Moore, 67 Mo. 192.
[8] Armstrong v. State, 30 Fla. 170, 17 L. R. A. 484; Beaubien v. Cicotte, 12 Mich. 459; Wood v. State, 58 Miss. 741; Sharp v. Kansas City Cable R. Co.

and upon the incidents actually observed;[1] and upon the intelligence and honesty of the witnesses;[2] and upon their freedom from interest and bias.[3] Thus, the opinions of witnesses who were present at the execution of the will are entitled to particular weight,—especially where they were attesting witnesses.[4] And evidence of the neighbors of a party who were of sound judgment and fair powers of observation, and who had known him long and well, and had occasion to observe and test the vigor of his mental faculties, and can give the facts upon which their impressions and opinions are based, is ordinarily the most reliable on the question of senile dementia.[5] So, greater reliance is to be placed upon the testimony of an impartial and respectable lawyer in regard to the due execution of a will prepared by him than upon that of a nonprofessional witness.[6] But the testimony of the attorney who drew a will, tending to show that the testator knew what he was about, cannot be said, as matter of law, to be controlling where there is evidence of great age, and many circumstances indicating an enfeebled mental condition.[7] And a will will not be set aside upon the testimony of a number of witnesses, all of whom were related to the testator, as to his unsoundness of mind, as against that of the three witnesses to the will who were not interested and were not connected with his family, and were apparently free from prejudice, and had an abundant opportunity to form a judgment as to his condition, that he was of sound mind.[8] And letters written by a testator at about the time he made his will, evidencing a sound discriminating mind, are more

114 Mo. 94; Clifton v. Clifton, 47 N. J. Eq. 227; Culver v. Haslam, 7 Barb. 314; State v. Kalb, 2 Ohio Leg. News, 364; Harris v. State, 18 Tex. App. 287; Burton v. Scott, 3 Rand. (Va.) 399.

[1] Sharp v. Kansas City Cable R. Co. 114 Mo. 94; Sharp v. Merriman (Mich.) 2 Det. L. N. 890.

[2] Clifton v. Clifton, 47 N. J. Eq. 227.

[3] Culver v. Haslam, 7 Barb. 314.

[4] Kerr v. Lunsford, 31 W. Va. 680, 2 L. R. A. 668; Nicholas v. Kershner, 20 W. Va. 251.

[5] Hiett v. Shull, 36 W. Va. 563.

[6] Jueke v. Adam, 1 Redf. 454.

[7] Petrie v. Petrie, 25 N. Y. S. R. 309.

[8] Sutton v. Morgan, 30 N. J. Eq. 629.

reliable than speculations and opinions of witnesses as to testamentary incapacity.[1] So, knowledge of the habits of the insured with reference to intemperance, asserted by witnesses in an action upon an insurance policy, who were not intimate with him and saw him only occasionally, amounts to no more than the assertion of an opinion, and will not be entitled to equal weight with less positive testimony of other witnesses founded upon a more extensive acquaintance.[2] No rule can be laid down, however, declaring what opportunities to observe are necessary to entitle a witness to give an opinion as to mental capacity.[3] And it cannot be said, as a matter of law, that witnesses who had less acquaintance with the person whose sanity is questioned and less opportunities to observe may not be as reliable witnesses as others who have special training, experience, or habits of close observation.[4] And an instruction upon the question of insanity, that where witnesses are of equal capacity the opinions of those who have better means of knowledge are ordinarily of greater weight than the opinions of those who have less means of knowledge, is objectionable as an interference with the province of the jury to determine the weight of evidence.[5] And questions asked a witness on cross-examination in a will contest as to whether he thought the testator had sufficient mind at the time of making his will to give the directions required therefor, are not competent for the purpose of ascertaining the degree of intelligence possessed by the witness in order to determine what reliance should be placed on his evidence.[6]

So, the opinions of witnesses as to mental capacity are to be weighed by the facts upon which they are based, such facts being of more importance than the opinions.[7] And all of the facts

[1] Harper v. Harper, 1 Thomp. & C. 851.

[2] Knickerbocker L. Ins. Co. v. Foley, 105 U. S. 350, 26 L. ed. 1055.

[3] Beaubien v. Cicotte, 12 Mich. 459.

[4] Cline v. Lindsey, 110 Ind. 337.

[5] Fulwider v. Ingels, 87 Ind. 414; Cline v. Lindsey, 110 Ind. 337; Durham v. Smith, 120 Ind. 463.

[6] Re McCarthy, 55 Hun, 7.

[7] Clark v. Sawyer, 3 Sandf. Ch. 351; Rush v. Megee, 36 Ind. 69; M'Daniel's Will, 2 J. J. Marsh. 331; Stackhouse v. Horton, 15 N. J. Eq. 202; Eloi v. Eloi, 36 La. Ann. 563; Wilcox v. State, 94 Tenn. 106; Kinleside v. Harrison, 2 Phillim. Eccl. Rep. 449.

connected with the person's conduct, language, and appearance at and preceding the time in question are to be considered in testing the value of the opinions expressed thereon.[1] And the opinions of witnesses as to want of testamentary capacity are entitled to but little weight as against proof of facts evincing sufficient testamentary capacity;[2] and are entitled to little or no regard unless supported by good reasons founded on facts which warrant them.[3] So, opinions based upon facts too weak and inconclusive to warrant them are insufficient to justify the submission of the issue of testamentary capacity to the jury.[4] And the opinion of a witness in a will contest as to whether the testator had capacity to make the will in question, though perhaps admissible, should be carefully guarded by the judge in his instructions where it is proved that the witness based it upon his knowledge that the testator was subject to delusions which had no effect upon such capacity.[5] Nor is an instruction in a criminal prosecution, that conduct, language, and appearance of the accused should be considered for the double purpose of testing the value of the opinions of witnesses based upon such facts and of determining the fact of insanity independent of such opinions, subject to the objection that it tells the jury that if they find the accused insane they must do so from facts independent of those used as a basis for opinions, where they are also told that weight and credit should be given the opinions.[6] While the admissibility of the opinions of nonexpert witnesses as to sanity or insanity is a question for the court, however, their weight and the effect which shall be given them is one exclusively for the jury,[7] to be deter-

[1] State v. Mewherter, 46 Iowa, 88.

[2] Carpenter v. Calvert, 83 Ill. 62; Doughty v. Doughty, 7 N. J. Eq. 643.

[3] Kinne v. Kinne, 9 Conn. 102, 21 Am. Dec. 732; Jamison v. Jamison, 3 Houst. (Del.) 108; Jones v. Perkins, 5 B. Mon. 222; Chase v. Winans, 59 Md. 475; Sloan v. Maxwell, 3 N. J. Eq. 563; Lowe v. Williamson, 2 N. J. Eq. 82; Clifton v. Clifton, 47 N. J. Eq. 227; Nexsen v. Nexsen, 2 Keyes, 232; Young v. Barner, 27 Gratt. 96; Kerr v. Lunsford, 31 W. Va. 680, 2 L. R. A. 668; Jarrett v. Jarrett, 11 W. Va. 584.

[4] Green's Estate, 140 Pa. 137; Harrison v. Rowan, 3 Wash. C. C. 580.

[5] Rice v. Rice, 53 Mich. 432. And see also Charter Oak L. Ins. Co. v. Rodel, 95 U. S. 235, 24 L. ed. 433.

[6] State v. Jones, 64 Iowa, 356.

[7] Colee v. State, 75 Ind. 513; Petrie v. Petrie, 25 N. Y. S. R. 309; New-

mined upon a consideration of the facts testified to by them upon which such opinions are based.[1] And the reasons of witnesses for their opinions on the question of mental soundness are also for the consideration of the jury, and not of the court.[2] As is also the question whether the means of information, or the facts proved, or the conclusions drawn by a witness as to sanity or insanity are sufficient to base their conclusion upon.[3] And an instruction that the testimony of witnesses who depose to sanity is to be preferred to the testimony of those to the contrary is properly refused.[4] Opinion evidence may be rebutted or explained in the same way as any other legal and competent testimony.[5]

VI. Attesting Witnesses.

The attesting witnesses to a will are placed around the testator at the time of its execution for the special purpose of ascertaining and judging of his capacity;[6] and as a general rule they are permitted to testify as to the opinion they formed at the time as to the condition of his mind, whether sound or unsound,[7] without a

hardt v. Yundt, 132 Pa. 324; Commonwealth Title Ins. & T. Co. v. Gray, 150 Pa. 255; Elcessor v. Elcessor, 146 Pa. 359; Titlow v. Titlow, 54 Pa. 216, 93 Am. Dec. 691; State v. Hayden, 51 Vt. 296.

[1] State v. Hayden, 51 Vt. 296; Titlow v. Titlow, 54 Pa. 216, 93 Am. Dec. 691; Taylor v. Com. 109 Pa. 262; Foster v. Dickerson, 64 Vt. 233; Wood v. State, 58 Miss. 741; Wise v. Foote, 81 Ky. 10.

[2] Gray v. Obear, 59 Ga. 675.

[3] McClackey v. State, 5 Tex. App. 320; Nexsen v. Nexsen, 2 Keyes, 232.

[4] Newhardt v. Yundt, 132 Pa. 324.

[5] United States v. Holmes, 1 Cliff. 98.

[6] Ethridge v. Bennett, 9 Houst. (Del.) 295; McDaniel v. Crosby, 19 Ark. 533; Needham v. Ide, 5 Pick. 510; Poole v. Richardson, 3 Mass. 330; Young v. Barner, 27 Gratt. 96.

[7] Walker v. Walker, 34 Ala. 469; Ethridge v. Bennett, 9 Houst. (Del.) 295; Lodge v. Lodge, 2 Houst. (Del.) 418; Kelly v. McGuire, 15 Ark. 556; McDaniel v. Crosby, 19 Ark. 533; Call v. Byram, 39 Ind. 499; Re Harper's Will, 4 Bibb. 244; Robinson v. Adams, 62 Me. 369, 16 Am. Rep. 473; Martin v. Perkins, 56 Miss. 204; Needham v. Ide, 5 Pick. 510; Poole v. Richardson, 3 Mass. 330; Williams v. Spencer, 150 Mass. 346, 5 L. R. A. 790; Hamblett v. Hamblett, 6 N. H. 333; Holcomb v. Holcomb, 95 N. Y. 316; Clapp v. Fullerton, 34 N. Y. 190, 90 Am. Dec. 681; Dewitt v. Barley, 9 N. Y. 371; Crowell v. Kirk, 3 Dev. L. 355; Pidcock v. Potter, 68 Pa. 342, 8 Am. Rep. 181.

previous statement of the facts and circumstances upon which such opinion is based,[1] and without assigning cause or reason therefor,[2] the rule that the opinions of nonexpert witnesses must be based on facts to be entitled to weight not applying to the subscribing witnesses to a will;[3] though either party may examine the witnesses as to what transpired at the time they witnessed the instrument.[4] And the subscribing witnesses may be cross-examined as to the condition of the testator's mind when the will was executed, such condition being a part of the *res gestæ*.[5] The witness is not required to have any knowledge other than that derived from the conduct of the testator at the time.[6] So, a request to an attesting witness to give his opinion as to the testatrix's capacity to make a disposition of her property is not subject to the objection that he has not seen her sufficiently to be able to judge.[7] And permitting the contestants of a will to cross-examine the subscribing witnesses on the question of soundness of mind before they have opened their case is not a departure from the rule of evidence that the defendant, who had not opened his case, will not be allowed to introduce it to the jury by cross-examining the adverse party.[8] The opinion given must be the one entertained when the will was made, and not one subsequently formed.[9]

Upon the other hand, however, it has been held that the opinions of witnesses to a will as to testamentary capacity are competent when the facts and circumstances upon which such opinions are founded are disclosed,[10] and that the opinion of a

[1] Logan v. McGinnis, 12 Pa. 27; Titlow v. Titlow, 54 Pa. 216, 93 Am. Dec. 691; Potts v. House, 6 Ga. 324; Robinson v. Adams, 62 Me. 369, 16 Am. Rep. 473; Williams v. Lee, 47 Md. 321; Van Huss v. Rainbolt, 2 Coldw. 139.

[2] Gibson v. Gibson, 9 Yerg. 329; Puryear v. Reese, 6 Coldw. 21.

[3] Young v. Barner, 27 Gratt. 96.

[4] Robinson v. Adams, 62 Me. 369, 16 Am. Rep. 473.

[5] Egbert v. Egbert, 78 Pa. 326; Re Coleman, 111 N. Y. 220.

[6] Re Coleman, 111 N. Y. 220.

[7] Foster v. Dickerson, 64 Vt. 233.

[8] Egbert v. Egbert, 78 Pa. 326.

[9] Williams v. Spencer, 150 Mass. 346, 5 L. R. A. 790.

[10] Abraham v. Wilkins, 17 Ark. 292; Kelly v. McGuire, 15 Ark. 555; Cilley v. Cilley, 34 Me. 162.

subscribing witness as to the sanity of the testator is not admissible in evidence where he testifies to no facts with relation to it.[1] And that refusal to permit a witness to state whether there was anything in the testator's manners or appearance different from what he had seen for the year past is not erroneous as in conflict with the rule that a subscribing witness can give his opinion generally as to soundness of mind where he did not describe the manner and appearance of the testator, but merely stated the conversations had with him and what was done.[2] So, it has been held that a nonexpert witness who is the subscribing witness to a deed, offered to prove the mental capacity of the grantor, is within the same principle which allows a subscribing witness to a will to give his opinion upon the question of sanity or insanity.[3] But the opposite rule that deeds are good without subscribing witnesses, and that the rule, allowing subscribing witnesses to wills to testify as to their opinions of the testator's capacity does not apply to the subscribing witnesses to a deed who must testify to facts only on the question of the sanity or capacity of the grantor, has been adopted to some extent.[4] But where the attesting witnesses to a deed are dead, it will be assumed that they would have sworn to the sanity of the grantor.[5] And a deed attested by a witness who afterwards became blind may be read in evidence on proof of the witness's handwriting, without calling him.[6] But a subscribing witness to a deed must be called in an action thereon where *non est factum* is pleaded, though he has become blind; it is not enough to prove his handwriting.[7] So, as a general rule declarations of a deceased attesting witness to a will, made after his attestation, to the effect that the testator was of unsound mind, are not admissible, as by attesting the witness asserts in legal effect the mental capacity of the grantor.[8] "And the declarations of one of three subscribing wit-

[1] Kenworthy v. Williams, 5 Ind. 375; Dickinson v. Dickinson, 61 Pa. 401.
[2] Petrie v. Petrie, 25 N. Y. S. R. 309.
[3] Brand v. Brand, 39 How. Pr. 196.
[4] Dean v. Fuller, 40 Pa. 474.
[5] Towart v. Sellars, 5 Dow, P. C. 231.
[6] Pedler v. Paige, 1 Moody & R. 258.
[7] Crank v. Frith, 2 Moody & R. 262, 9 Car. & P. 197.
[8] Boardman v. Woodman, 47 N. H. 120; Stephenson v. Stephenson, 62

nesses to a will that the testator was insane are not admissible to defeat the will where he was absent from the state and no proof of handwriting had been given.[1] Nor can they be given after his death to impeach the evidence given by him in probate court, where the testator had not been interdicted, and the fact that he was subsequently interdicted is of no account.[2] Nor can a subscribing witness be asked if he would have subscribed the will if he had known the contents.[3] And while evidence of another witness, that he heard the subscribing witness making inconsistent declarations as to the sanity of the testatrix, has been held admissible as discrediting the subscribing witness,[4] it is not admissible as primary evidence, as it would be mere hearsay.[5]

So, a subscribing witness to a will cannot be asked if he thought the testator had mind sufficient at the time he executed his will to give specific directions with reference to the disposition of his property, such inquiry embracing the very question covered by the issue.[6] And the opinion of such a witness as to the strength of mind required to comprehend a clause creating charitable trusts is not admissible in a will contest.[7] Nor is evidence not limited to the inquiry as to the opinion of a witness at the time of the execution of the will rendered competent by the fact that the witness was a subscribing witness.[8] But an answer of a subscribing witness as to his belief of the testator's mental capacity will not be suppressed where it appears that the word "belief" was used as synonymous with opinion.[9] And he need not use the statutory formula "sound mind and memory" in stating his belief as to testamentary capacity; it is sufficient if he states it in equivalent words.[10] And under the Illinois statute the testimony

Iowa, 163; Sewall v. Robbins, 139 Mass. 164; Baxter v. Abbott, 7 Gray, 71; Harden v. Hays, 9 Pa. 151; Sellars v. Sellars, 2 Heisk. 430; Cheatham v. Hatcher, 30 Gratt. 56.

[1] Fox v. Evans, 3 Yeates, 506.
[2] Runyan v. Price, 15 Ohio St. 1, 86 Am. Dec. 459.
[3] Spence v. Spence, 4 Watts, 165.
[4] Colvin v. Warford, 20 Md. 357.
[5] Stirling v. Stirling, 64 Md. 138.
[6] Re McCarthy, 55 Hun, 7.
[7] Melanefy v. Morrison, 152 Mass. 473.
[8] Re McCarthy, 55 Hun, 7.
[9] Hughes v. Hughes, 31 Ala. 519.
[10] Bice v. Hall, 120 Ill. 597.

of the subscribing witnesses to a will only is admissible upon the question of insanity.[1] And where one subscribing witness testifies to sanity and the other to insanity the evidence of other witnesses is not admissible to establish the will.[2] So, evidence of previous inconsistent declarations of an attesting witness is admissible where he has testified that the testator did not have testamentary capacity and the proponent has examined him only so far as the law made it his imperative duty.[3] And it has been held that while the fact that an attesting witness has testified to the execution of a will affords prima facie evidence that he considered the testator sane it does not prevent him from testifying as to his opinion on the subject of his mental condition.[4] And that a will should be probated upon satisfactory evidence of testamentary capacity, though the subscribing witnesses may testify against capacity.[5]

The opinions of the attesting witnesses to a will, and the facts stated by them as occurring at the time of its execution, are entitled to great weight.[6] But the opinion of a witness who is a stranger to the testator, and who sees and hears nothing except what is necessary to enable him to attest, should be given less weight than that of a neighbor and familiar acquaintance of a testator; and neither is of any weight except as proved to be correct from facts which justify and warrant it.[7] And a will which is attested while the testator is in a state of insensibility is not attested in his presence within the meaning of a statute requiring such attestation, though he was corporally present.[8] So, a statu-

[1] Bice v. Hall, 120 Ill. 597.

[2] Weld v. Sweeney, 85 Ill. 50.

[3] Thornton v. Thornton, 39 Vt. 122.

[4] Williams v. Lee, 47 Md. 321.

[5] Martin v. Perkins, 56 Miss. 204. And see Griffin v. Griffin, R. M. Charlt. (Ga.) 217; Spencer v. Moore, 4 Call (Va.) 423; Butler v. Benson, 1 Barb. 526; Peebles v. Case, 2 Bradf. 226; Jauncey v. Thorne, 2 Barb. Ch. 40; Le Breton v. Fletcher, 2 Hagg. Eccl. Rep. 558; Lowe v. Joliffe, 1 W. Bl. 365; Sechrest v. Edwards, 4 Met. (Ky.) 163; Howard's Will, 5 T. B. Mon. 199; Perkins v. Perkins, 39 N. H. 163.

[6] Turner v. Cheesman, 15 N. J. Eq. 243. And see Allison v. Allison, 7 Dana, 91; Brock v. Luckett, 4 How. (Miss.) 459; Kemble v. Church, 3 Hagg. Eccl. Rep. 273.

[7] Garrison v. Garrison, 15 N. J. Eq. 266.

[8] Right v. Price, 1 Dougl. 241.

tory requirement that a will shall be attested by at least two credible witnesses requires such attestation by persons who are not disqualified by mental imbecility or otherwise from giving testimony in a court of justice.[1] But a subscribing witness to a codicil is not competent on the question of insanity under the Tennessee rule where at the time of making it he was a legatee under the original will.[2]

VII. Books.

The doctrine has been stated that standard medical works on insanity and scientific works on medical jurisprudence are admissible in evidence, and may be read to the jury by counsel upon the question of sanity or insanity;[3] and that counsel may read to the jury a case from regular law reports in which the question of insanity is discussed, and is not confined to the opinion of the court, but may read the facts of the case and the comments thereon.[4] But scientific works on medical jurisprudence have not the weight of legal authorities except so far as the views expressed in them have been recognized and sustained by judicial ruling.[5] And it has been held that cases decided in other states or in England should not be allowed to be read to the jury from books for the purpose of showing that the facts set forth in such case were not inconsistent with the soundness of mind necessary to the performance of the act in question.[6]

But the general rule would seem to be that though a resort to medical science for many purposes is highly advantageous in judicial proceedings, medical writers possess no power to prescribe the rule which limits the extent of human responsibility for crime;[7] and that books on the subject of insanity written by physicians or lawyers, though of established reputation, are not ad-

[1] Fuller v. Fuller, 83 Ky. 345.

[2] Gass v. Gass, 3 Humph. 278.

[3] State v. Hoyt, 46 Conn. 330; State v. West, Houst. Crim. Rep. (Del.) 371; State v. Coleman, 20 S. C. 441.

[4] State v. Hoyt, 46 Conn. 330.

[5] State v. West, Houst. Crim. Rep. (Del.) 371.

[6] Baldwin's Appeal, 44 Conn. 37.

[7] Com. v. Haggerty, 4 Clark (Pa.) 187.

missible in evidence, and cannot be read to the jury.[1] Nor can statistics of the increase of insanity as stated by the court or counsel in another state be read;[2] and counsel has no right in his address to the jury to quote the opinions of medical men as given in their works.[3] But while counsel cannot be permitted to read to an expert witness on the question of sanity what has been said by an eminent authority and ask him whether he concurred in his views, he may use such statements to assist him in framing questions for the witness as to his own opinion;[4] and although scientific books cannot be read for the purpose of proving the facts or establishing the doctrine stated in them it is proper to call the attention of expert witnesses, upon cross-examination, to books upon the subject of insanity, and ask them whether or not others whom they admit to be authority do not express opinions different from that which was given by them upon the stand, the extent to which such examination may go resting largely in the discretion of the court.[5]

[1] Com. v. Wilson, 1 Gray, 339; Davis v. State, 38 Md. 15; Fraser v. Jennison, 42 Mich. 206; Hall v. Com. (Pa.) 11 Cent. 183; Collier v. Simpson, 5 Car. & P. 74; Cocks v. Purday, 2 Car. & K. 270.

[2] Com. v. Wilson, 1 Gray, 339.

[3] Queen v. Crouch, 1 Cox, C. C. 94.

[4] State v. Coleman, 20 S. C. 441.

[5] Egan v. Dry Dock, E. B. & B. R. Co. 12 App. Div. 556.

CHAPTER XI.

WITNESSES AND JURORS.

I. COMPETENCY OF WITNESSES.
II. COMPETENCY OF JURORS.

I. COMPETENCY OF WITNESSES.

The rule as generally stated is that persons who are *non compos mentis* are not competent witnesses. The reason for not admitting the testimony of persons *non compos mentis*, however, is that their malady involves such a want or impairment of the faculties that facts are not correctly impressed on their minds, or are not retained in their memory, or that they do not understand their responsibility as witnesses; and if such reasons for the exclusion of witnesses do not exist they should be permitted to testify.[1] The mere fact, therefore, that a witness was a lunatic is not enough to excuse him from giving evidence unless at the time of the examination he is so far under the influence of his malady as to be deprived of that share of understanding which is necessary to enable him to retain in memory the events of which he has been a witness, and as not to have a knowledge of right and wrong.[2] A person is competent as a witness where at the time he was offered to be sworn he possessed such understanding as enabled him to retain in memory the events of which he had been a witness,[3] and to appreciate the sanctity and binding force of the obligation of an oath.[4] But he is not competent if he is unable

[1] Worthington v. Mencer, 96 Ala. 310, 17 L. R. A. 407.

[2] Coleman v. Com. 25 Gratt. 865, 18 Am. Rep. 711.

[3] Walker v. State, 97 Ala. 85; Clements v. McGinn (Cal.) 33 Pac. 920; Tucker v. Shaw, 158 Ill. 326; Cannady v. Lynch, 27 Minn. 435; Com. v. Reynolds, cited in 10 Allen, 64; Coleman v. Com. 25 Gratt. 865, 18 Am. Rep. 711; Hiett v. Shull, 36 W. Va. 563; District of Columbia v. Armes, 107 U. S. 519, 27 L. ed. 618; Reg. v. Hill, 2 Den. C. C. 254, 5 Cox, C. C. 259, 5 Eng. L. & Eq. 547; Fennell v. Tait, 1 Cromp. M. & R. 584; Spittle v. Walton, L. R. 11 Eq. 420. And see State v. Brown (Del.) 36 Atl. 458.

[4] Walker v. State, 97 Ala. 85; Clements v. McGinn (Cal.) 33 Pac. 920; Holcomb v. Holcomb, 28 Conn. 177; Com. v. Reynolds, cited in 10 Allen, 64; Cannady v. Lynch, 27 Minn. 435; Coleman v. Com. 25 Gratt. 865, 18 Am. Rep. 711; Hiett v. Shull, 36 W. Va. 563; District of Columbia v. Armes, 107 U. S. 519, 27 L. ed. 618; Reg. v. Hill, 2 Den. C. C. 254, 5 Cox, C. C. 259, 5 Eng. L. & Eq. 547.

to understand such obligation whatever may have been the character of his incapacity,[1] though, if he understands that perjury is punishable by law, it is sufficient though he has no conception of the religious obligation of an oath.[2] Thus, it is no objection either to the competency or credibility of a witness that he is subject to fits of derangement if at the time he is offered it appears that he is sane,[3] and an allegation by a plaintiff in his complaint that he was at one time insane does not render him incompetent to testify as a witness in an action,[4] though an insane person is not as a general rule liable to compulsory examination as a witness by the adverse party before trial.[5] The modern doctrine is that the testimony of a witness who is insane or laboring under a delusion is to be received with proper caution and considered in connection with his incapacity, rather than to be rejected or struck out.[6]

The sanity and competency of a witness are presumed,[7] and where his mental capacity is questioned the burden of showing unsoundness of mind which will disqualify him rests with the person claiming it,[8] though where general insanity is established it is presumed to continue, and the party offering the witness must show restoration;[9] and he may support his objection either by an examination of the witness[10] or by the testimony of other witnesses.[11] The question whether the person who is offered as a

[1] Livingston v. Kiersted, 10 Johns. 362; Armstrong v. Timmons, 3 Harr. (Del.) 343; State v. Meyers, 46 Neb. 152. And see Fuller v. Fuller, 17 Cal. 605; Kilburn v. Mullen, 22 Iowa, 498; Phebe v. Prince, Walk. (Miss.) 131; Hartford v. Palmer, 16 Johns. 143; Gebhart v. Shindle, 15 Serg. & R. 235.

[2] Snyder v. Nations, 5 Blackf. 295.

[3] Campbell v. State, 23 Ala. 44; Evans v. Hettich, 20 U. S. 7 Wheat. 453, 5 L. ed. 496; State v. Kelley, 57 N. H. 549.

[4] Cannady v. Lynch, 27 Minn. 433. And see Holcomb v. Holcomb, 28 Conn. 177.

[5] Mason v. Libbey, 2 Abb. N. C. 137.

[6] People v. Harper, 1 Edm. Sel. Cas. 180; McCutchen v. Pigue, 4 Heisk. 565; Reg. v. Hill, 2 Den. C. C. 254, 5 Cox, C. C. 259, 5 Eng. L. & Eq. 547.

[7] See State v. De Wolf, 8 Conn. 93, 20 Am. Dec. 90; Gainesville v. Caldwell, 81 Ga. 76; Robinson v. Dana, 16 Vt. 474.

[8] Harrod v. Harrod, 1 Kay & J. 9; State v. Holloway, 8 Blackf. 45.

[9] Armstrong v. Timmons, 3 Harr. (Del.) 342.

[10] Reg. v. Hill, 5 Cox, C. C. 259, 5 Eng. L. & Eq. 547.

[11] Livingston v. Kiersted, 10 Johns. 362; District of Columbia v. Armes, 107 U. S. 519, 27 L. ed. 618. But see Bell v. Rinner, 16 Ohio St. 45.

witness is insane at the time goes to the competency of the witnesses, and is a preliminary one to be decided by the court,[1] and it is for the judge to satisfy himself whether the witness understands the nature of the oath and is capable of relating what he has seen,[2] and his determination will not be disturbed on appeal where no abuse of discretion appears;[3] and the court on appeal will presume that the judge was not influenced by such evidence as he ought not to have considered.[4] But the decision on a preliminary examination is not conclusive in subsequent stages of the trial, and the court may stop the examination when satisfied of the incapacity, and direct the jury to disregard the evidence.[5] It is not the duty of the trial court to examine a witness as to mental soundness, however, merely because one of the parties alleges it, unless it sees some indication of unfitness to testify.[6] And whether a witness is incompetent because of unsoundness of mind has been held to be a fact to be proved by the evidence of others and not by the examination of the witness alone, and that a refusal to permit a preliminary examination is not error.[7] Such unsoundness is to be proved in the same mode as insanity in any other case, and evidence of previous and subsequent insanity is admissible;[8] but a record of justices finding a person to be insane and a proper person to be admitted to the insane hospital for curable insane is not admissible nine years after to prove that the same person was then insane.[9] So, that a material witness in a criminal prosecution had received a head injury during the war is admissible in evidence for the purpose of showing his mental condition as an excuse for failure to call him to testify.[10] But an

[1] Clements v. McGinn (Cal.) 33 Pac. 920; Holcomb v. Holcomb, 28 Conn. 177; Dickson v. Waldron, 135 Ind. 507, 24 L. R. A. 483; Carpenter v. Dame, 10 Ind. 125; District of Columbia v. Armes, 107 U. S. 519, 27 L. ed. 618. And see Kendall v. May, 10 Allen, 59.

[2] Com. v. Reynolds, cited in 10 Allen, 64; People, Norton, v. New York Hospital, 3 Abb. N. C. 229.

[3] Dickson v. Waldron, 135 Ind. 507, 24 L. R. A. 483.

[4] Campbell v. State, 23 Ala. 44.

[5] Queen v. Whitehead, L. R. 1 C. C. 33.

[6] Cannady v. Lynch, 27 Minn. 435.

[7] Robinson v. Dana, 16 Vt. 474.

[8] Holcomb v. Holcomb, 28 Conn. 177.

[9] Breedlove v. Bundy, 96 Ind. 319.

[10] Hoard v. State, 15 Lea, 318.

inquiry of a witness in a criminal prosecution for the purpose of showing his superstitious notion with respect to power derived from eating certain roots is too remote from the subject to be allowed, as it need not necessarily hinder him from being a good observer and narrator of facts.[1]

Nor is proof that a witness had convulsive fits evidence from which it can be inferred that he had not sufficient mind to be a witness.[2] But the mental deficiencies of an adult which would exempt him from accountability for his own conduct proximately contributing to his personal injury would also render him an incompetent witness of the occurrences in which the injury was received.[3] So, one who has been adjudged insane and is under guardianship is not a competent witness while his condition remains unchanged.[4] An inquisition of lunacy against a witness is prima facie evidence of his incompetency to testify, though his testimony is offered against one who was not a party to the proceedings in lunacy;[5] but it is not conclusive.[6] And a commission may issue to take the testimony of a person committed to a lunatic asylum in another state, though the return must be submitted to the presiding justice upon the trial, who must institute an investigation as to the competency of the witness.[7] The objection of incompetency cannot be decided by the officer taking the deposition.[8] And when a deposition of a witness alleged to be incompetent is offered in evidence it is within the discretion of the court to refuse to permit it to be impeached on that ground where the evidence to sustain mental capacity would have to be sought in another state and it could not be produced in season for use in the trial in progress.[9] And a deposition previously made may be admitted in evidence where the witness is insane at

[1] Allen v. State, 60 Ala. 19.

[2] James v. Stonebanks, 1 N. J. L. 227.

[3] Worthington v. Mencer, 96 Ala. 310, 17 L. R. A. 407.

[4] Hull v. Louth, 109 Ind. 315, 58 Am. Rep. 405.

[5] Hoyt v. Adee, 3 Lans. 173. And see Spittle v. Walton, L. R. 11 Eq. 420.

[6] Kendall v. May, 10 Allen, 59; Hoyt v. Adee, 3 Lans. 173.

[7] Hand v. Burrows, 23 Hun, 330; Carpenter v. Dame, 10 Ind. 125.

[8] Carpenter v. Dame, 10 Ind. 125.

[9] Carpenter v. Dame, 10 Ind. 125.

the time of the trial, though it was not taken *de bene esse*.[1] But the affidavit of a person suffering from a mental delusion, made while in confinement in a lunatic asylum, cannot be received unless his condition was first ascertained by preliminary inquiry properly made and a notice placed in the jurat of the circumstances under which it was taken.[2] Provisions that persons of unsound mind cannot be witnesses, however, refer to a mind that is unsound in fact as contradistinguished from those which have been judicially declared insane;[3] and a person who has been insane and who has apparently recovered may testify to facts occurring during the period of insanity where they are objectively demonstratable and constitute a basis from which to give such testimony.[4] And one who has been placed under guardianship but subsequently duly adjudged sane and released is competent to testify,[5] the discharge of the witness from an asylum being prima facie evidence of restoration, or that he was improperly committed.[6] And a lunatic under confinement in a lunatic asylum is competent where he is aware of the nature and sanctity of an oath, and the trial judge considers him competent in point of understanding;[7] and he might be brought into court to testify upon satisfactory proof that he is not dangerous and that he is in a fit state to be brought in.[8] But the probative force of personal and self-regarding incidents occurring during a period of insanity, and testified to by its subject either while still insane or when recovered, rests solely upon corroborating circumstances.[9]

The question whether a witness sane when called upon to testify was insane at the time of the transaction concerning

[1] Reg. v. Marshall, Car. & M. 147. And see Jones v. Jones, 1 Cox, Ch. Cas. 184; Murley v. Templeman, cited in Shelford, Lunatics, 495.

[2] Spittle v. Walton, L. R. 11 Eq. 426. And see Re Christie, 5 Paige, 242; Re Cross, 2 Ch. Sent. 283.

[3] Clements v. McGinn (Cal.) 33 Pac. 920.

[4] People, Norton, v. New York Hospital, 3 Abb. N. C. 229.

[5] Sarbach v. Jones, 20 Kan. 499.

[6] Clements v. McGinn (Cal.) 33 Pac. 920.

[7] Reg. v. Hill, 2 Den. C. C. 258; Tucker v. Shaw, 158 Ill. 326. And see Kendall v. May, 10 Allen, 59; State v. Brown (Del.) 36 Atl. 458; Cannady v. Lynch, 27 Minn. 435.

[8] Fennell v. Tate, 1 Cromp. M. & R. 584.

[9] People, Norton, v. New York Hospital, 3 Abb. N. C. 229.

which he testifies, however, goes to the credibility and not to the competency of the witness and may be properly considered by the jury, and it is a question concerning which evidence may be adduced by the opposite party;[1] though in case of subsequent intervening insanity of a temporary nature the court will direct an adjournment in a proper case to await a recovery.[2] And the existence of delusions in the mind of a witness at the time of the trial goes to his credit and not to his competency, the question of credibility being one for the jury,[3] though a witness who is proved to have been afflicted with general insanity will not be permitted to testify where there are instances of strong evidence of delusion existing down to a recent period.[4] And in weighing the testimony of a person who was of unsound mind at the time of the occurrence of the facts in question, a distinction is recognized by law between knowledge of a fact and belief of a fact, and between an event which is objective and demonstratable and an incident which may be merely personal and subjective, and is of especial importance.[5] The rule that insanity destroys the capacity of a witness, and that the question of competency must be determined when the witness is called and before he is sworn, however, is relaxed where the incompetency first appears from the testimony of a witness himself, or where the fact is to be shown *aliunde*.[6] And while the evidence adduced to the court to show insanity of a witness cannot be submitted to the jury to affect his credibility after the court decides that he is sane,[7] the general rule would seem to be that where a witness is not so deficient as to require his exclusion by the court it is for the jury to determine from his appearance and manner and from the evidence on the subject whether he is so mentally incapable as to render his testimony unworthy of acceptance,[8] it being a question for the jury to decide what amount of credit shall be given his

[1] Holcomb v. Holcomb, 28 Conn. 177. And see Gainesville v. Caldwell, 81 Ga. 76.

[2] Coleman v. Com. 25 Gratt. 865, 18 Am. Rep. 711.

[3] Walker v. State, 97 Ala. 85; Sarbach v. Jones, 20 Kan. 499.

[4] Armstrong v. Timmons, 3 Harr. (Del.) 343.

[5] People, Norton, v. New York Hospital, 3 Abb. N. C. 229.

[6] Pease v. Burrowes, 86 Me. 153.

[7] Campbell v. Sate, 23 Ala. 44.

[8] Worthington v. Mencer, 96 Ala. 310, 17 L. R. A. 407; Gainesville v. Caldwell, 81 Ga. 76.

testimony.[1] And the testimony of a witness who declares himself unable to answer questions on the ground that his memory fails at times because of mental injury resulting from sunstroke will not be stricken out but submitted to the jury.[2] So, the force of the testimony of a person concerning a personal incident during a period of insanity with regard to himself rests wholly upon the corroborating circumstances, but he may testify to such facts provided they are objectively demonstratable and constitute a basis for his testimony.[3] And evidence that a witness who had been examined had been of imbecile mind and memory is admissible to affect his credibility, though it was not offered as an objection to his competency,[4] though mere evidence of other witnesses that he was not possessed of ordinary intelligence is inadmissible.[5] So, a witness's credibility may be attacked by evidence that his mind and memory had become impaired by disease;[6] or by evidence as to his stupid conduct at a coroner's inquest previously held;[7] or that he talked irrationally at times and quarreled with women without cause or provocation.[8] And where there is a direct conflict in the testimony of two witnesses, and one of them is aged and has had an attack of paralysis, an expert witness may be asked if paralysis did not have a tendency to impair the mind of aged persons.[9] And the evidence of an old man with but little knowledge of passing events and feeble memory of past transactions, who did not know what place he was in while on the stand, or where he stayed the night before, or came from that morning, and could not remember

[1] Dickson v. Waldron, 135 Ind. 507, 24 L. R. A. 483; Com. v. Reynolds, cited in 10 Allen, 64; Sarbach v. Jones, 20 Kan. 499; Pease v. Burrowes, 86 Me. 153; District of Columbia v. Armes, 107 U. S. 519, 27 L. ed. 618; Reg. v. Hill, 2 Den. C. C. 254.

[2] Lewis v. Eagle Ins. Co. 10 Gray, 508.

[3] People, Norton, v. New York Hospital, 3 Abb. N. C. 229.

[4] Rivara v. Ghio, 3 E. D. Smith, 364. And see Livingston v. Kiersted, 10 Johns. 362.

[5] Bell v. Renner, 16 Ohio St. 45.

[6] Alleman v. Stepp, 52 Iowa, 626; Fairchild v. Bascomb, 35 Vt. 298. And see Carpenter v. Dame, 10 Ind. 125.

[7] Territory v. Padilla (N. M.) 46 Pac. 346.

[8] Territory v. Padilla (N. M.) 46 Pac. 346.

[9] Lord v. Beard, 79 N. C. 5.

having changed his place of residence, is worthless for the purpose of showing a transaction with him to have been fraudulent.[1]

Proof that a witness was in the habit of using laudanum is not sufficient to discredit or weaken his testimony unless it is also established that his mind was thereby impaired or that he was under the influence of an opiate at the time the testimony was given.[2] And the general reputation of a witness as to sanity is not admissible to affect his credibility.[3] Nor is a question asked a witness in a criminal case as to what he said on a preliminary examination about the same matter some months before, to test his memory, so relevant as to justify a reversal because of its rejection, where his answers gave the impression that his memory was weak and that he was easily confused.[4] And the admission of evidence that a witness whose competency had been attacked had told the same story before is not a ground for reversal, where it tended to corroborate her evidence and help the jury to a right estimation of her intellectual faculties.[5] So, a lunatic called as a witness may examine and cross-examine witnesses called on either side to determine the question of his competency.[6] And a witness called for that purpose may detail facts and express opinions as to the competency of another witness.[7] So, the cross-examination of a witness, the incredibility of whose stories raises an inference that he imagines fanciful occurrences, is competent for the consideration of the jury on the question of the weight to be given to her direct evidence though it includes other matters which would be inadmissible if considered independently; but it is not evidence of the facts stated.[8] And the court on a criminal prosecution should upon special request instruct the jury on the question of the sanity or insanity of a witness whose testimony is attacked on that ground though the testimony as to his insanity is very slight.[9]

[1] Woodhull v. Whittle, 63 Mich. 575.
[2] McDowell v. Preston, 26 Ga. 528.
[3] Territory v. Padilla (N. M.) 46 Pac. 346.
[4] Allen v. State, 60 Ala. 19.
[5] Bricker v. Lightner, 40 Pa. 199.
[6] Reg. v. Hill, 2 Den. C. C. 254, 5 Cox, C. C. 259.
[7] Bricker v. Lightner, 40 Pa. 199.
[8] Pease v. Burrowes, 86 Me. 153.
[9] Territory v. Padilla (N. M.) 46 Pac. 346.

Secondary evidence of what a witness testified to on a preliminary investigation before a committing magistrate may be given on his trial where his testimony on such examination was not reduced to writing and he has since become insane.[1] And an instrument may be proved by evidence of the handwriting of the attesting witness where he has become insane since its execution.[2] So, the deposition or testimony of a witness fairly taken in the same case may be read in evidence on a subsequent trial where he has become insane or has lost his memory of the past, the same as though he were dead or out of the jurisdiction.[3] And a book of accounts kept by one who has become insane proved to be in his handwriting is admissible in evidence upon being verified by the oath of his guardian when material to the issue.[4] But the failure of a witness to recollect particular facts will not justify proving his testimony on a former trial where such forgetfulness does not amount to mental imbecility.[5] And the temporary insanity of a party whose book of accounts is material evidence will only operate as a postponement until sufficient time has elapsed for his restoration, though it will be admitted in evidence where restoration cannot be reasonably expected.[6] The precise words of a witness on the preliminary investigation before a committing magistrate who has since become insane, and whose testimony was not reduced to writing, need not be given in giving secondary evidence thereof upon the trial for the same offense, the substance of the testimony being all that is necessary.[7]

So, under statutes disqualifying insane witnesses the disqualification applies only when the unsoundness is such as would render a witness incompetent at common law,[8] though under the Texas statute a witness is rendered absolutely incompetent when he was in an insane condition of mind either at the time when he was offered as a witness or at the time of the happening of the events concerning which he was called to testify.[9]

[1] Marler v. State, 67 Ala. 55, 42 Am. Rep. 95.
[2] Currie v. Child, 3 Campb. 283; Burnett v. Taylor, 9 Ves. Jr. 381.
[3] Emig v. Diehl, 76 Pa. 359; Gainesville v. Caldwell, 81 Ga. 76.
[4] Holbrook v. Gay, 6 Cush. 215.
[5] Stein v. Swensen, 46 Minn. 360.
[6] Holbrook v. Gay, 6 Cush. 215.
[7] Marler v. State, 67 Ala. 55, 42 Am. Rep. 95.
[8] Cannady v. Lynch, 27 Minn. 435.
[9] Lopez v. State, 30 Tex. App. 487.

II. Competency of jurors.

Insanity of a juror is a good cause for discharging the jury in a criminal case though it be without the consent of the prisoner or his counsel, and such discharge is in the discretion of the court and cannot form the subject of a plea in bar to a further trial.[1] But the mental defect which will disqualify a juror must amount to such imbecility or such gross ignorance as practically disqualifies him from performing his duties as such,[2] and when alleged as a ground for a new trial it must be proved by clear and full evidence.[3] One whose mind is so weak, however, that he cannot be made to understand the obligations of an oath or feel religious scruples is not competent to be a juror;[4] and the fact that the Constitution makes colored persons qualified jurors has no effect upon mental defects as a ground for disqualification, the same imbecility or defect of mental capacity disqualifying a colored person as a white person.[5] So, the existence of an abstract opinion on the part of an individual as to the propriety or impropriety of the defense of insanity in a criminal prosecution does not disqualify a person for being a juror.[6] Nor does a mistaken view of the law applicable to the defense of insanity, or an adverse opinion of feigned defenses of that character where the person discloses a willingness to yield readily to the law as it exists, and has no prejudice against a genuine defense.[7] But a juror in a prosecution for a crime of great enormity in which insanity is alleged, who does not think a man who commits such an offense can be of sound mind, and to change his opinion evidence would be required, is disqualified, as the law presumes the accused to be sane;[8] and that a juror considered the fact of suicide as conclusive evidence of insanity is a good cause for a challenge in an action upon an insurance policy where the assured died by his own hand.[9]

[1] United States v. Haskell, 4 Wash. C. C. 402.
[2] Caldwell v. State, 41 Tex. 86.
[3] State v. Scott, 1 Hawks (N. C.) 24.
[4] Caldwell v. State, 41 Tex. 86.
[5] Caldwell v. State, 41 Tex. 86.
[6] People v. Carpenter, 102 N. Y. 245, 38 Hun, 490; Hall v. Com. (Pa.) 11 Cent. Rep. 183; Butler v. State, 97 Ind. 378.
[7] Butler v. State, 97 Ind. 378.
[8] Com. v. Buccieri, 153 Pa. 535.
[9] Hiatt v. Mutual L. Ins. Co. 2 Dill. 572, note.

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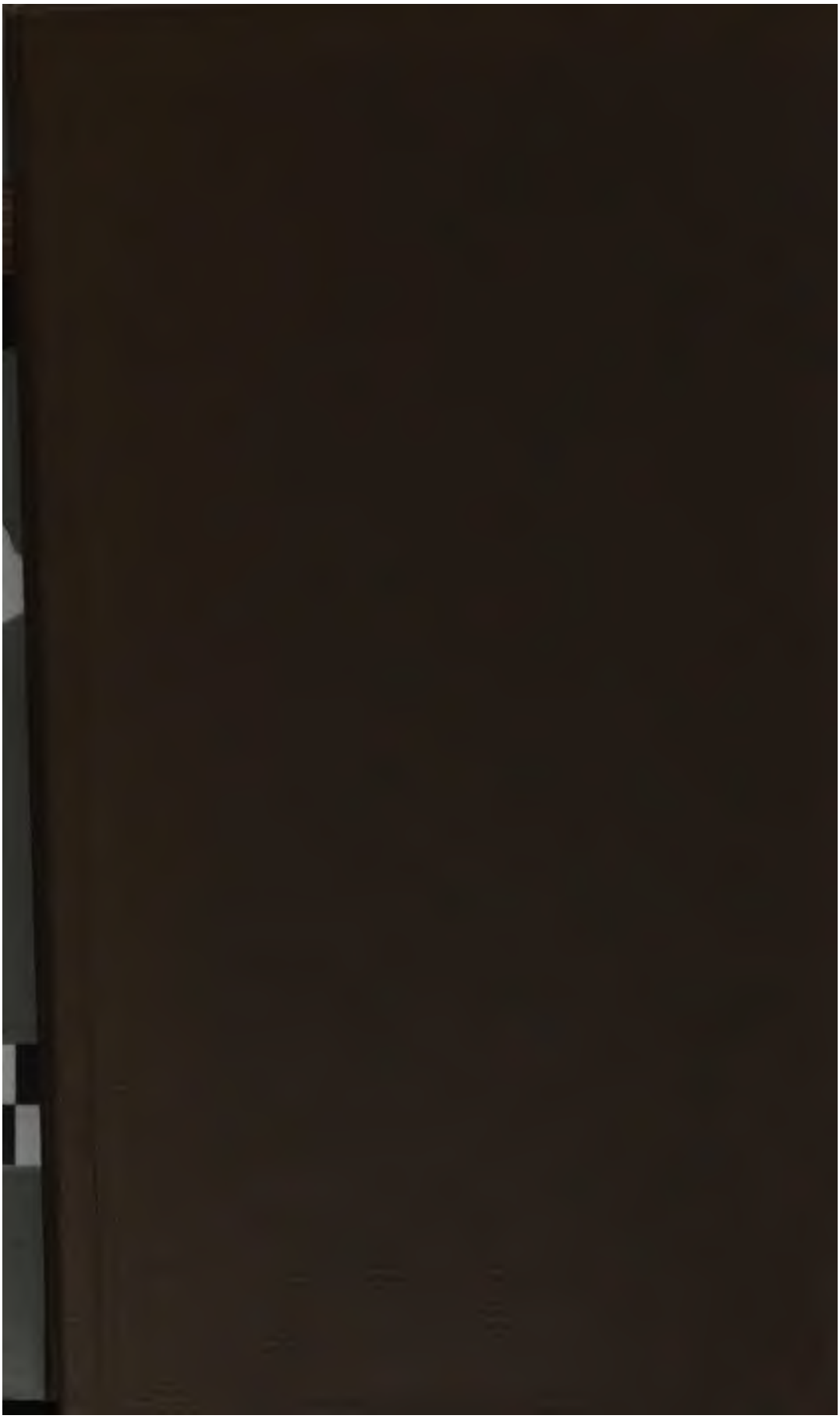
I1151 Clevenger, S.V.
C63 Medical juris-
v.1 dence of insanity.
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H.W. Fritschen JAN 28 25